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Deferring to Chinese government, US Court of Appeals overturns vitamin C cartel judgment

On 20 September 2016, the Second Circuit Court of Appeals in the United States overturned a federal district court judgment in a class action antitrust lawsuit against two Chinese companies accused of conspiring to fix the price and output of vitamin C sold into the United States.

The opinion overturned a jury verdict against the Chinese companies awarding the plaintiffs approximately USD 147 million (close to RMB 1 billion) in damages. The case is noteworthy because the Court of Appeals held that the companies were compelled to fix price and output by Chinese law, and therefore their conduct was outside the antitrust jurisdiction of U.S. federal courts.

Background
The vitamin C case began a decade ago when vitamin C buyers began filing complaints alleging that Chinese vitamin C sellers had fixed prices and output. The cases were eventually consolidated in a multi-district class action in the Eastern District of New York. Defendants moved to dismiss the complaint based on the act of state doctrine, the defense of foreign sovereign compulsion, and the principle of international comity. The district court denied the motion to allow for further discovery on the issue.

Defendants subsequently moved for summary judgment on the same grounds. The district court again denied the motion, declining to give deference to the interpretation of Chinese law made by China’s Ministry of Commerce (MOFCOM), which intervened as amicus curiae in the case. The district court found that “Chinese law did not compel Defendants’ anticompetitive conduct.” The case went to trial, and, in March 2013, a jury awarded plaintiffs approximately USD 147 million in damages and an injunction barring defendants from fixing the price or output of vitamin C.

Court of Appeals’ opinion
Defendants Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corp. appealed the district court’s judgment. In a unanimous opinion written by Judge Peter W. Hall, the three-judge Second Circuit panel at the Court of Appeals held that the district court had “abused its discretion by not abstaining, on international comity grounds, from asserting Jurisdiction.” The opinion said that the district judge “erred by concluding that Chinese law did not require Defendants to violate U.S. antitrust law and further erred by not extending adequate deference to the Chinese Government’s proffer of the interpretation of its own laws.” The Court of Appeals ruling is binding law in the Second Circuit (New York, Vermont, and Connecticut), and potential persuasive authority in other federal courts.

The case is remarkable because the amicus brief filed by MOFCOM represents the first time an entity of the Chinese government ever has appeared amicus curiae before any U.S. court. The Court of Appeals held that it was bound to MOFCOM’s position that Chinese law required the defendants to fix prices and output: “when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements... even if that representation is inconsistent with those laws might be interpreted under the principles of our legal system.”
The Court of Appeals noted that “deference in this case is particularly important because of the unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and ours.” The court held that it did not matter whether defendants helped create the Chinese mandate or whether the Chinese mandate was enforced. “It is enough that Chinese law actually mandated such action, regardless of whether Defendants benefited from, complied with, or orchestrated the mandate.”

After finding that a true conflict existed between Chinese and U.S. law, the Court of Appeals proceeded to consider the remaining factors in the international comity test, finding that each of those factors supported abstaining from jurisdiction over plaintiffs’ claims. In considering those factors, the court noted that “the exercise of jurisdiction by the district court has already negatively affected U.S.-China relations,” reflected in communications from the Chinese government to the federal courts and U.S. Department of State.

**Takeaways**

International companies doing business in the United States may face conflicting obligations under U.S. law and the law of their home country. The Court of Appeals’ ruling provides international companies with a stronger basis for objecting to U.S. antitrust claims when those companies cannot simultaneously comply with U.S. antitrust law and the law of their home country. However, international companies doing business in the United States should be mindful that:

- As the Court of Appeals held, the mere existence of a conflict between U.S. antitrust law and the law of the home country is not alone sufficient to avoid federal courts. Instead, the defendant must satisfy a multi-factor balancing test reflecting international comity standards.
- In evaluating whether a “true conflict” exists between U.S. antitrust law and the law of the home country – a critical threshold element of the multi-factor test – a court may afford strong deference to the home country’s explanation of its own laws.
- Where the existence of a conflict between U.S. antitrust law and the law of the home country is not particularly clear, international companies run a greater risk of protracted antitrust litigation over many years, even if they ultimately prevail.
General Court confirms schism between EU and US approaches to reverse payments in patent settlements

The General Court of the European Union, based in Luxembourg, has confirmed the European Commission’s hard-line approach to patent settlement agreements involving reverse payments – so-called “pay for delay” cases.

On 8 September 2016, the General Court handed down its judgment on Lundbeck’s appeal of the Commission’s decision in which it found that Lundbeck had entered into anti-competitive bilateral agreements with four manufacturers of generic pharmaceuticals. At the same time, the General Court handed down its judgments in the appeals brought by the generics companies against the same decision. These important cases have been subject to much interest not least because of the number of other on-going antitrust investigations and appeals into “pay for delay” arrangements.

The agreements between Lundbeck and the generic companies

The Commission’s decision concerned six agreements between the Danish originator pharmaceutical company Lundbeck and four generic pharmaceutical companies covering the UK, Denmark and/or the EEA between 2002 and 2003. At the heart of the agreements was the anti-depressant citalopram. Lundbeck had patents covering the compound and several of the production processes but, at the time of the agreements, the compound and the original production process patents had expired. According to the Commission, while Lundbeck still had a number of production process patents, a generic citalopram producer could have entered the market using the original production process or another process not covered by Lundbeck’s remaining patents.

The agreements were concluded in the context of potential patent disputes involving varying degrees of disagreement between Lundbeck and generics companies regarding the validity of Lundbeck’s patents.

The Commission found that Lundbeck made payments to the generic companies in exchange for their agreement not to market the product for a period of time in the UK, Denmark or the EEA (as applicable). Some of the generics companies were in the preparatory stages of entering the market, while one had actually begun to market the product for a few days before concluding an extension of its agreement with Lundbeck.

The Commission’s investigation and interest in the pharmaceutical sector

The Commission was originally alerted to the agreements by the Danish competition authority, and subsequently by the Hungarian competition authority. The Commission’s investigation took a lengthy 10 years, from the first efforts to collect information, through dawn raids, to the final decision.

During the same period, the Commission also carried out its sector inquiry into the pharmaceutical sector, culminating in its 2009 report, which concluded amongst other things that market entry of generic drugs had been delayed, partly due to settlements between originator and generic companies. The Commission decided to apply increased antitrust scrutiny to the pharmaceutical sector going forward and monitor settlements that limit or delay the market entry of generic drugs. Shortly thereafter, the Commission opened formal proceedings against Lundbeck.

In June 2013, the Commission concluded that the settlement agreements concluded between Lundbeck and the generic companies represent so-called pay-for-delay agreements and amount therefore to a restriction of competition by object in breach of Article 101 TFEU and Article 53 of the EEA agreement. The Commission imposed aggregate fines of approximately EUR 94 million on Lundbeck and an aggregate of more than EUR 52 million on the four generic pharmaceutical companies.
The General Court’s assessment

Lundbeck’s appeal was based on ten separate pleas – covering both substantive and procedural alleged defects in the Commission’s approach, including that the Commission had erred by finding that the generics manufacturers were potential competitors of Lundbeck, and by finding that the agreements were restrictions of competition ‘by object’.

All of Lundbeck’s pleas were rejected by the General Court in their entirety.

More than 250 paragraphs of the General Court’s judgment are devoted to Lundbeck’s first plea – that the Commission had misinterpreted the relevant case-law on establishing whether Lundbeck and the generics manufacturers were potential competitors.

In dismissing Lundbeck’s arguments, the General Court confirmed that the Commission did not need to demonstrate with certainty that the entry of the generic companies to the market would have taken place before the expiry of the agreements at issue in order to establish that they were potential competitors to Lundbeck. Instead, according to the General Court, the Commission was required to determine whether, if the agreements had not been concluded, there would have been real concrete possibilities for the generics manufacturers to enter that market and to compete with Lundbeck. The judgment includes a lengthy description of the facts underlying the various agreements which the General Court found were sufficient for the Commission to have found that there were such “real concrete possibilities”.

In relation to whether the settlement agreements amounted to restrictions of competition ‘by object’ – ie could be regarded by their very nature as being injurious to the proper functioning of normal competition – the General Court confirmed the approach taken by the Commission in its decision. In doing so, it held that:

- The very existence of reverse payments from Lundbeck to the generics manufacturers and the disproportionate nature of those payments were relevant factors in establishing whether the agreements at issue constituted restrictions of competition ‘by object’.
- By making those payments, Lundbeck provided an incentive to the generics not to continue their independent efforts to enter the market.
- The Commission was not required to demonstrate irrefutably that Lundbeck doubted the validity of its patents in order to establish the existence of an infringement by object. Instead, what mattered was whether there was uncertainty, at the time the agreements were concluded, as to the possibility for the generics to enter the market without being subject to injunctions or infringement actions, or of successfully challenging the validity of Lundbeck’s patents, and that the agreements had replaced that uncertainty, by means of significant reverse payments, with the certainty that the generics would not enter during the term of the agreements.

There are a number of other noteworthy points in the judgment.

First, the General Court found that whilst in certain cases the conclusion of a patent settlement is not anticompetitive, particularly where it is based on the assessment of the strength of the patents made by each of the parties to the agreement, or where it provides for a reverse payment without delaying the market entry of generics, in this case the Commission was correct to consider that the reverse payments had enabled Lundbeck to obtain commitments from the generics manufacturers which they would not have been able to obtain in the absence of those payments, thereby delaying their market entry.
Secondly, the General Court found it to be “doubtful” that the agreements really resolved the underlying patent disputes between Lundbeck and the generics manufacturers, as the agreements did not provide for any immediate market entry for the generics upon the expiration of the agreement coupled with a commitment from the applicants to refrain from bringing patent infringement proceedings.

Thirdly, the General Court rejected Lundbeck’s argument that the restrictions contained in the agreements were ‘objectively necessary’ and proportionate in order to protect its intellectual property rights. In particular, the General Court held that Lundbeck could have protected those rights by bringing actions before the competent national courts in the event that their patents were infringed. It also pointed out there were numerous ways of settling a patent dispute without agreeing to restrictions on the market entry of generics manufacturers by means of reverse payments.

Fourthly, the General Court rejected Lundbeck’s argument that the agreements allowed it to avoid significant costs linked to litigation in various countries, as well as the risk of conflicting decisions resulting from litigation before multiple courts. It held that most of the agreements contained no specific reference to the costs of the litigation that would be avoided, nor an estimate of those costs. In addition, the General Court stated that Lundbeck did not provide any explanation about the manner in which the amounts of the reverse payments were calculated, except that they resulted from negotiations, whereas the Commission’s decision contained evidence showing that those amounts broadly corresponded to the profits expected by the generics had they entered the market or to the damages that they might have obtained if they had succeeded in litigation against Lundbeck.

What does the judgment mean for future patent settlements?

The General Court’s judgment is a victory for the Commission’s hard-line approach in the EU to assessing patent settlements involving reverse payments between originators and generics manufacturers.

The General Court’s finding that the settlements restricted competition ‘by object’ stands in stark contrast to the approach adopted by the U.S. Supreme Court in 2013 in FTC v. Actavis. In Actavis, the Supreme Court expressly rejected the U.S. Federal Trade Commission’s call for per se treatment, instead ruling that such patent settlement agreements should be analyzed under the ‘rule of reason’ balancing test. According to the Supreme Court, it is only where a patent settlement agreement involves a “large, unjustified reverse payment” that there is a “risk of significant anticompetitive effects”. Thus, the Supreme Court left open the possibility that even agreements involving a payment from the originator to the generic may in some circumstances be justified, namely where the payment represents only avoided litigation costs or fair market value for services.

For companies considering entering into patent settlements that cover markets in the EU, the General Court’s affirmation of the Commission’s approach means that significant care must be taken when negotiating and finalising the terms of any such agreements.

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Online sales are not only attracting the attention of consumers and tech businesses, but also increased review by antitrust regulators. On 15 September 2016, the European Commission published a detailed 290 page preliminary report on its e-commerce sector inquiry.

While commenting on the release of the report, EU Competition Commissioner Margrethe Vestager stated that the report should be “a trigger for companies to review their current distribution contracts and bring them in line with EU competition rules if they are not”. She states that the information from the sector inquiry will help the European Commission spot cases where there may be a competition law infringement, and, if necessary, take action in those cases. The European Commission is therefore preparing not only for new regulatory proposals, but for infringement actions against individual companies, in particular as regards geo-blocking. Geo-blocking refers to practices used by online sellers that result in the denial of access to websites based in other EU Member States.

Businesses should be aware that this is not only relevant for EU-based entities, but for all companies selling online or distributing content in the EU, including many US-based companies.

Foundation of the report
The European Commission launched its e-commerce sector inquiry in May 2015 as part of its Digital Single Market Strategy. The European Commission gathered information (including by sending individual questionnaires) from nearly 1800 stakeholders throughout the EU and collected 8000 distribution agreements.

The inquiry covers e-commerce in consumer goods and digital content.

Online sale of consumer goods
In relation to goods, the report examines the prevalence of certain distribution models (such as exclusive and selective distribution agreements). It also investigates any contractual provisions which limit the ability of retailers (i) to sell cross-border within the EU, (ii) to sell or advertise online, (iii) to sell on marketplaces, (iv) to use price comparison tools, and (v) to set the retail price freely.

The report’s key findings include the following:

– **Selective Distribution: Is brand protection a legitimate justification?** As a result of the growth of e-commerce, there has been increased recourse to selective distribution as well as the use of new selection criteria. The report notes that the use of certain clauses restricting online sales in selective distribution agreements “may go beyond what is necessary to achieve the goals of selective distribution”, and comments that it “may investigate possible anti-competitive clauses restricting online sales in selective distribution agreements”. It can be expected that brand protection will be an important factor for these investigations. When drafting commercial agreements, manufacturers should make sure to specify why their products and services warrant a selective distribution system to ensure high quality distribution and coherent brand image in order to guarantee a “shopping experience” for the customer also online.

– **Cross-border sales restrictions.** Over one in ten retailers report that suppliers impose contractual restrictions on cross-border sales. Contractual cross-border sales restrictions are not always written in agreements, but are sometimes communicated orally. The report states that its preliminary findings are that “a number of territorial restrictions may raise concerns regarding their compatibility with EU competition rules”. It seems likely that the European Commission will open individual investigations into such cases given that it has access to a large database of agreements from the sector inquiry.
– **Marketplaces: No clear guidance in sight.** 20% of the retailers are contractually restricted from selling on online marketplaces. The European Commission considers that its findings do not show that marketplace bans constitute hardcore restrictions within the meaning of the EU Vertical Block Exemption Regulation. This is because they concern how the distributor can sell the products over the internet, and do not have the object to restrict where and to whom distributors can sell. However, the report states that “this does not mean that absolute marketplace bans are generally compatible with EU competition law”. Thus, the report does not fully resolve the issue, which has been the subject of a number of controversial court cases at Member State level, in particular in Germany.

– **RSP and price restrictions: How much does it cost?** Over 40% of the retailers report price recommendations or price restriction from manufacturers. While recommending sales prices ("RSP") is not illegal under EU antitrust law, there is likely to be an infringement when a recommendation contains a binding element. The report comments that “increased transparency and the use of price monitoring/pricing software by both retailers and manufacturers may impact the competitive process in e-commerce markets.” The report concludes that certain pricing agreements between manufacturers and their retailers may merit further investigation on a case-by-case basis. To date, many resale price maintenance cases are dealt with by national competition law authorities.

– **Price comparison website.** The European Commission is also concerned about contractual restrictions for the submission of offers to price comparison websites. “While such general bans may be a cost effective way to prohibit the use of a promotion channel deemed not fitting for the product in question, they may also exclude an effective method for retailers to generate traffic on their website that is providing (potential) customers increased price transparency across a range of different retailers.”
Digital content

In relation to digital content, the report examines the presence of territorial restrictions and geo-blocking in the online distribution of digital content. It also investigates the copyright licensing models for online distribution and their potential impact on competition.

The report’s key findings include the following:

– **Geo-blocking.** In addition to the fact that rights are often licensed on a national basis, the European Commission finds that “a large majority” of digital content providers are required by right holders to restrict access to their online digital content services for users from other EU Member States by means of geo-blocking. Commissioner Vestager has identified tackling geoblocking as a priority for her activities with respect to online content.

– **Duration of licensing agreements.** Licensing agreements “are often concluded for rather long durations and contracting parties often renew existing agreements”, which is sometimes done on the basis of automatic renewal clauses and clauses providing for a right of first negotiation, a right of first refusal or a matching offer right. The European Commission is concerned that this could make it more difficult for new players to enter the market, or for existing operators to expand their current commercial activities into e.g. other transmission means such as online, or to other geographic markets.

– **Payment mechanisms.** There is widespread use of minimum guarantees and fixed/flat fees, often in conjunction with advance payments, in the payment mechanisms which determine the amounts digital content providers have to pay right holders for the licensed online rights. The European Commission notes that this might make it more difficult for new entrants to gain a foothold in the market.

– **Case-by-case assessment.** The European Commission will assess “on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets, whether certain licensing practices may restrict competition and whether enforcement is necessary in order to ensure effective competition”. It can be expected that these investigations will be rather lengthy as a number of new questions regarding the relationship between competition law, IP law and the digital market reality need to be aligned.

Next steps

The European Commission has opened its preliminary report for public consultation, which it hopes will trigger a facts-based exchange of views with stakeholders. The deadline for comments is 18 November 2016. The European Commission states that it expects to publish its Final Report in the first quarter of 2017. The report goes hand in hand with new rules for digital content currently being proposed by the European Commission on copyright, portability of subscriptions and geo-blocking.

With the current heating up of antitrust scrutiny in the online world, companies are advised to review thoroughly their distribution agreements.

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UK company agrees to pay HSR fine in connection with vesting of restricted stock units

On 10 August 2016, the Federal Trade Commission (FTC) announced that Caledonia Investments plc (Caledonia), a UK public limited company, agreed to pay a fine of US$480,000 to settle charges that it violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino (HSR) Act of 1976 when it acquired voting securities of Bristow Group, Inc. (Bristow) in February 2014 through the vesting of restricted stock units.

Under the HSR Act, the acquisition of voting shares of an issuer is subject to pre-closing filing and waiting period requirements if the HSR threshold tests would be satisfied as a result and if no exemption would apply. The maximum civil penalty for an HSR violation increased from US$16,000 per day to US$40,000 per day effective 1 August 2016. The new maximum civil penalty for HSR violations applies to any civil penalties assessed after 1 August 2016, including penalties based on earlier violations.

According to the complaint in United States v. Caledonia Investments plc (the Complaint), Caledonia had made an HSR filing on 5 June 2008, to report its acquisition of voting shares of Bristow valued in excess of the US$50 million threshold test (as adjusted).

Under 16 C.F.R. Section 802.21, an exemption was available to Caledonia for subsequent acquisitions of Bristow voting shares if (i) Caledonia did in fact cross the US$50 million (as adjusted) threshold within a year from the expiration or termination of its 2008 HSR filing waiting period, (ii) the subsequent acquisitions of Bristow voting shares occurred within five years of the expiration or termination of the waiting period applicable to its 2008 HSR filing, and (iii) the subsequent acquisitions would not result in Caledonia crossing a higher HSR notification threshold.

On 3 February 2014, Caledonia acquired additional shares of Bristow through the vesting of restricted stock units. Because this acquisition occurred more than five years after the expiration or termination of Caledonia’s 2008 HSR filing waiting period, it was not exempt under Section 802.21 and, according to the Complaint, Caledonia had an obligation to report this acquisition under the HSR Act. Caledonia did not actually file an HSR form to report this acquisition, however, until 4 February 2015, more than one year later. The HSR waiting period expired on 5 March 2015. Therefore, according to the Complaint, Caledonia was in violation of the HSR Act from 3 February 2014, through 6 March 2015.
The FTC has a “one bite at the apple” policy and typically does not impose fines on parties who inadvertently miss an HSR filing obligation if, among other things, such parties self-report the violation upon discovery and make a corrective HSR filing soon thereafter. Although Caledonia claimed its violation was inadvertent and made a corrective HSR filing, the FTC still sought a fine in this case because Caledonia had missed an HSR filing obligation in the past. Specifically, Caledonia did not file an HSR form when it acquired voting shares of Offshore Logistics, Inc. (Bristow’s previous name) in excess of the applicable HSR threshold amounts on 19 December 1996. At that time, Caledonia did not qualify for the “solely for the purpose of investment” exemption because it named two of its employees to the board of Offshore Logistics, Inc. Caledonia made a corrective HSR filing to report this acquisition on 3 June 1997, explaining that the missed filing obligation was inadvertent. No fines were imposed against Caledonia at that time.

Significantly, the Competitive Impact Statement explained that the Government did not seek the maximum fines permitted under the HSR Act in this case “because the violation was inadvertent, the Defendant promptly self-reported the violation after discovery, and the Defendant is willing to resolve the matter by consent decree and avoid prolonged investigation and litigation.”

There are several key takeaways from this enforcement action.

- U.S. and foreign entities should consider HSR filing issues in advance of acquiring any voting shares, assets, or non-corporate interests through any means, including the vesting of restricted stock units.
- Application of the HSR exemptions can be complex and experienced HSR counsel should be consulted before reliance on any exemption.
- All entities who acquire assets, voting shares, or non-corporate interests—including those entities who have inadvertently missed an HSR filing obligation and filed a corrective HSR filing in the past (no matter how many years ago)—should establish and follow comprehensive HSR compliance procedures.

As with other recent HSR enforcement actions, this enforcement action underscores the importance of consulting in advance with experienced HSR counsel in connection with acquisitions of voting shares, assets, or non-corporate interests, regardless of whether the parties are U.S. entities and regardless of how the acquisition is structured.

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DOJ and FTC propose updated Antitrust Guidelines for Licensing of Intellectual Property

On 12 August 2016, the U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) proposed updates to their Antitrust Guidelines for the Licensing of Intellectual Property (Guidelines).

The agencies have not amended the Guidelines since they were originally released in 1995. The revisions do not substantively modify the general principles of the 1995 Guidelines, and they do not address some of the hottest topics at the intersection of antitrust and IP law, notably conduct involving standard essential patents (SEPs) and patent assertion entities (PAEs).

The proposed revisions do not include any broad changes to the antitrust agencies’ enforcement approach; DOJ and FTC will still “apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property.” FTC Chairwoman Edith Ramirez stated that the updated guidelines “ree affirm our view that U.S. antitrust law leaves licensing decisions to IP owners, licensees, private negotiations and market forces unless there is evidence that the arrangement likely harms competition.” The proposed revisions do, however, take into account recent developments in the case law.

Another example is the Supreme Court’s 2006 decision in Illinois Tool Works v. Independent Ink, which ruled that patents do not necessarily confer market power. The 1995 Guidelines had already adopted that principle, but the revisions now expressly cite the Independent Ink case for that proposition.

The proposed revisions are perhaps most notable for what they excluded. In particular, the new Guidelines would not address any issues related to SEPs, a topic that has received considerable attention from both the FTC and DOJ over the past several years. SEPs are patents that are necessary (or have been declared essential) to a particular technology that is standardized to promote interoperability between devices or networks. Some standard setting efforts, such as the standards that enable wireless communications and Wi-Fi networking, involve hundreds or even thousands of such patents. The FTC has been active in applying antitrust principles to SEPs over the last 20 years since the original Guidelines were issued. In 2006, it found that Rambus had violated Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce,” by failing to disclose the existence of its patents, and then seeking unreasonable royalties from licensees once those patents were incorporated into a standard. The FTC also found that an entity may violate Section 5 by acquiring SEPs that the original patent holder agreed to license on reasonable and non-discriminatory (FRAND) terms and then failing to abide by that RAND commitment, or by making misrepresentations to a government agency that is establishing a standard.
More recently, the FTC entered consent orders against Robert Bosch GmbH and Google, Inc. pursuant to its authority under Section 5. The challenged behavior in both investigations related to the patent holder seeking injunctive relief based on alleged infringement of patents that had been declared essential to an industry standard requiring such patents to be licensed on RAND terms. The FTC challenged the mere act of seeking injunctive relief—conduct that usually is entirely within the scope of the patent—after committing the patents to an industry standard. The proposed revisions do not address the legal issues or policy concerns raised by any of these cases.

DOJ has also been active on SEP issues. It has engaged in advocacy to encourage standard setting organizations (SSOs) to address potential hold-up and other problems ex ante by modifying and clarifying their intellectual property rights (IPR) policies. For example, DOJ has asked SSOs to limit the right of SEP holders to seek injunctions, including by constraining the right to seek an injunction to situations where the potential licensee is “unwilling” to take a FRAND license. DOJ encouraged SSOs to give licensees the option to license FRAND-encumbered patents essential to a standard on a cash-only basis and prohibit the mandatory cross-licensing of patents that are not essential to the standard or a related family of standards, while permitting voluntary cross-licensing of all patents. DOJ also has asked SSOs to establish procedures that seek to identify, in advance, proposed technology that involves patents which the patent holder has not agreed to license on FRAND terms and consciously determine whether that technology should be included in the standard. The proposed revisions to the Guidelines do not incorporate any of these concerns.

The Guidelines revisions also do not address any issues related to PAEs, whose business model focuses on buying and asserting patents against operating companies already using the technology rather than contributing to the development or transfer of technologies. Citing increasing evidence of the massive economic and social costs of PAE activity, the Obama Administration has pursued several executive orders and legislative proposals aimed at curbing frivolous patent litigation and reducing PAEs’ ability to engage in anticompetitive behavior. In addition, the President’s Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy issued a report titled “Patent Assertion and U.S. Innovation,” which further described the problems associated with PAEs. The FTC has been conducting an industry study of the competitive effects of PAEs since 2013, but its findings have not yet been released. If the FTC study had been released before the proposed revisions to the Guidelines, perhaps the revisions would have addressed the topic.

The FTC and DOJ accepted public comments to the proposed revisions until September 26. Submitted comments will be made publicly available on the agencies’ websites.

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How to discuss your industry’s reaction to Brexit without falling foul of competition law

Given the economic, political and legal uncertainty following the “Leave” vote, businesses will understandably want to discuss with each other how Brexit will affect their industry and explore how they can help shape the future of the legal and regulatory landscape affecting it.

Such discussions will be valuable and necessary. However, communications between competitors attract suspicion from competition authorities, who will be concerned to ensure that those discussions do not breach competition law rules.

These guidelines, which apply to all formal and informal discussions, are intended to help businesses keep on the right side of competition law when entering into such discussions.

Legal framework

It is important to remember that agreements and other practices that prevent, restrict or distort competition are prohibited under both UK and EU competition law.

Although the UK’s legal and trading landscape may be changing, businesses must remain compliant with competition law. Breaches can have serious consequences for companies, trade associations and the individuals involved, including large corporate fines, disqualification as a director, imprisonment and personal fines, reputational damage and damages claims.

Permitted discussions

Businesses can discuss the following issues, including in the context of Brexit discussions, but only to the extent that those discussions do not involve pricing or other competitively sensitive information:

– General market trends and publicly available information;
– Government or regulatory policy;
– Joint industry lobbying and promotion initiatives; and/or
– Other purely technical/non-commercial issues.

It is also possible to collect, share and disseminate certain information, provided that this relates to historical data and is appropriately aggregated and anonymized (discussed further in this note).

If meetings are specifically intended to discuss Brexit and develop a joint lobbying effort, the discussion should be limited to this topic. Only information which is necessary to develop a strategy and a related lobbying position should be disclosed.

Prohibited discussions

Some general guidelines on what topics must be avoided are set out in this note. However, the golden rule is that businesses should not share information which would reduce competitive uncertainty in the market, or could help inform a competitor’s future commercial strategy.

No discussion of pricing information

Businesses should never discuss pricing practices or intentions. Competition authorities will be particularly concerned that discussions on Brexit should not, for example, provide businesses with the opportunity to insulate themselves from the current economic uncertainty by fixing prices. Businesses should not discuss or agree:

– Current prices (including information relating to discounts) or financial terms and conditions;
– Future pricing plans, including the timing of proposed price changes; and/or
– Past pricing levels, if that information allows inferences to be drawn about current or future pricing.

No discussion of other types of competitively sensitive information
Businesses should also not agree or discuss their own approach to any other matters that could be regarded as competitively sensitive. For example, businesses should never agree or discuss:

- Current or future marketing strategies, business, marketing or operational plans or strategies;
- Current or future profit margins or profitability targets;
- Customer lists or any other customer-specific information (including negotiating strategies and proposed contract terms);
- Cost information;
- Capacity or production, export, purchase and sales volumes; and/or
- Any other matter on which businesses compete.

Businesses should also not use Brexit related discussions to agree to take steps, for example, to protect the UK markets from competition from the rest of Europe.

**Before, during and after meetings – procedural safeguards**

In relation to any meetings or discussions, an agenda should be prepared in advance. At the beginning of each meeting, it should be made clear what discussions are permitted and what are prohibited. Official minutes should be prepared following each meeting, summarizing the discussions that took place.

If a discussion strays into prohibited matters, participants should leave the meeting immediately, and their departure (and the reason for their departure) should be noted in the official minutes. If the discussion is informal and/or no minutes were taken, legal advice should be sought immediately.

**Industry publications and reports**

As part of an industry lobbying effort, trade bodies may wish to prepare economic reports to support their position. This may require members to provide specific, potentially sensitive, information. If that is the case, a single, independent employee of the relevant trade body should be designated to collect the relevant information. That company-specific information should never be disseminated to members.

Instead, the information disseminated to members must be sufficiently historic to be no longer useful for taking business decisions (at least 12 months old – or longer depending on the business cycle in the industry concerned), and aggregated to prevent identification of information about individual members.

In addition, information should be disseminated to certain named individuals only, who are not sales or marketing staff or other “front-line” employees.

To find out more about how we can help you prepare for Brexit, either in the UK, the EU or globally, please contact our Brexit team via Brexit@hoganlovells.com or using the details below. For the latest thinking on Brexit, and further resources to help you develop your practical response strategy to Brexit, visit our Brexit Hub: www.hoganlovells.com/brexit

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Record fine for improper reliance on HSR Act investment-only exemption

On 12 July 2016, the U.S. Department of Justice (DOJ) announced that ValueAct Capital (ValueAct) agreed to pay a record US$11 million civil penalty to settle allegations that the activist investment firm violated the notification and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) when it acquired more than US$2.5 billion in voting shares of Halliburton and Baker Hughes.

The previous record fine for an HSR Act violation was US$5.67 million. This settlement comes three months after DOJ announced the enforcement action. The settlement also includes injunctive relief prohibiting ValueAct from relying on the “investment-only” exemption to the HSR Act’s filing requirements when it acquires shares with the intent to take certain specified actions or if its investment strategy with respect to a certain issuer in which it plans to acquire shares identifies circumstances under which it might take certain specified actions.

Background

On 17 November 2014, Halliburton and Baker Hughes announced their plan to merge. Between November 2014 and April 2016, when DOJ filed its Complaint, ValueAct entities purchased voting shares in both companies exceeding the then-applicable HSR size-of-transaction threshold amount. ValueAct relied on the “investment-only” exemption to the HSR reporting requirement, which is only available when an investor holds ten percent or less of the outstanding voting securities of an issuer and has no intention of participating in or influencing the management of the issuer. DOJ’s Complaint alleged that ValueAct improperly relied on the exemption and requested a civil penalty of at least US$19 million and a restraint against ValueAct from any future violations of the Act. DOJ pointed to several instances where ValueAct’s public statements, SEC filings, internal documents, and communications with the management or directors of the issuers signaled an intention to influence the management of the issuer.

The HSR investment-only exemption

The investment-only exemption applies to the acquisition of voting shares of a corporation “if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer,.....” 16 C.F.R. Section 802.9. The HSR Act rules define “solely for the purpose of investment” to mean that “the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.” 16 C.F.R. Section 801.1(i)(1). In practice, merely exercising voting rights is not inconsistent with an investment-only purpose. However, the following types of conduct would be considered inconsistent with an investment-only purpose: nominating a candidate for the board of directors of the issuer; proposing corporate action requiring shareholder approval; soliciting proxies; having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; being a competitor of the issuer, holding over 10% interests in a competitor of the issuer, or having a board seat on a competitor of the issuer; or doing any of the foregoing with respect to any entity under common control with the issuer.
Key takeaways

There are a number of significant takeaways from the DOJ’s Competitive Impact Statement (CIS) filed with the proposed Final Judgment:

– **Caution For Investors Whose General Investment Strategies “May” Involve Influencing a Company’s Business Decisions**

  DOJ stated that “the Defendants may not rely on the HSR Act’s investment-only exemption if they intend to take, or their investment strategy identifies circumstances in which they may take” certain actions including, among others, “proposing a merger, acquisition, or sale to which the issuer of the acquired voting securities is a party” or “proposing changes to the issuer’s strategies regarding pricing, production capacity, or production output of the issuer’s products and services.” CIS at 6 (emphasis added). Similarly, DOJ’s Complaint and the CIS both emphasized that ValueAct’s website described ValueAct’s investment strategy as one of “active, constructive involvement” in the management of the companies in which it invests and noted that “[t]he goal in each investment is to work constructively with management and/or the company’s board to implement a strategy or strategies that maximize returns for all shareholders.” Complaint at 2, 4; CIS at 4.

Investing entities that espouse (publicly or not) strategies of potentially taking certain actions under certain identified circumstances to influence management of the companies in which they invest possibly may not qualify for the investment-only exemption in connection with their acquisition of shares in such companies, regardless of their immediate intent at the time of the acquisition. At a minimum, such entities should not rely on the investment-only exemption without first consulting with HSR counsel.

– **Caution for Investors Considering an Activist Role in the Future**

  DOJ stated that “[a]n investor who is considering influencing basic business decisions – such as merger and acquisition strategy, corporate restructuring, and other competitively significant business strategies (relating to price, production capacity, or production output) – is not passive.” CIS at 6 (emphasis added). Again, investors should proceed with extreme caution before relying on the investment-only exemption if they even consider influencing management of the company in which they are investing.
**The FTC’s Premerger Notification Office (PNO) Is a Valuable Resource**  
DOJ cited several factors it took into account in determining the proper penalty in the ValueAct case. In doing so, DOJ noted that ValueAct should have realized the investment-only exemption did not apply in connection with its investments in Halliburton and Baker Hughes due to its intent to “take an active role in the business decisions” of both entities and if it “had any doubt about its obligations, it could have sought the advice of the [PNO], but did not do so.” CIS at 8.

This statement serves as a useful reminder that PNO staff is ready and willing to answer questions about application of the HSR threshold tests and exemptions to transactions. In fact, it is standard practice for HSR practitioners to reach out to the PNO by telephone or e-mail, without disclosing party names, describing relevant hypothetical facts and seeking guidance on, among other things, whether specific exemptions would apply to such facts. The PNO staff does an excellent job of responding to these queries quickly. Investors who are not certain that the investment-only exemption applies to their upcoming acquisition should discuss with their HSR counsel whether such counsel should consult with the PNO on this issue (again without disclosing the names of any parties).

Though ValueAct did not acknowledge any wrongdoing as part of the settlement, it has publicly stated that the recent 150% increase in civil penalties for violations of the HSR Act motivated its decision to settle. Under the new penalties, effective 1 August 2016, DOJ could have sought a maximum penalty of nearly US$50 million. Given the U.S. antitrust agencies’ recent enforcement actions targeting reliance on the investment-only exemption, and the significant increase in penalties, acquiring parties intending to rely on the investment-only and other HSR Act exemptions should consult with HSR counsel before closing their transactions.

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FTC more than doubles maximum civil penalty for HSR Act violations

On 29 June 2016, the Federal Trade Commission (FTC) announced significant increases to the maximum civil penalties for violations of numerous laws and regulations it enforces, including premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act).

The FTC increased the civil penalties for HSR Act violations 150% -- from US$16,000 per day to US$40,000 per day. These new penalties are effective as of 1 August 2016, although they will apply to any violations that occurred before that date.

These increases were required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (IAAI Act), which requires federal agencies to adjust civil penalties for inflation using a “catch-up” formula. The FTC last increased the maximum fine in 2009, from US$11,000 per day to US$16,000 per day. Going forward, the FTC will increase its maximum civil penalties annually pursuant to the IAAI Act—approximately at the same time it announces the revised HSR filing thresholds.

Under the HSR Act, certain acquisitions of assets, voting securities, or interests in non-corporate entities are subject to pre-closing notification filing and waiting period requirements if applicable jurisdictional thresholds are satisfied and no exemption applies. The purpose of the HSR Act is to allow the U.S. antitrust agencies to investigate and possibly challenge reportable acquisitions before they are closed. If a company or person fails to submit a required filing, and/or closes on a reportable acquisition before the applicable HSR waiting period has expired or been terminated, such company or person can face substantial civil penalties since each day of non-compliance (i.e., each day in which the acquiring person held the voting shares, assets or non-corporate interests without having filed and observed the waiting period) is a separate violation. Thus, under the new US$40,000 per day maximum, a violation that occurred for one year could incur a maximum civil penalty of US$14.6 million.

However, this is only the maximum penalty and the antitrust agencies do take into account mitigating factors when assessing the appropriate penalty, such as “degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.” In addition, the FTC has long adopted a “one-bite-at-the-apple” policy, whereby it typically does not impose a civil penalty for a company’s or person’s first inadvertent HSR Act violation so long as the company or person reports the violation to the FTC upon discovery, submits a corrective filing and a detailed letter explaining the circumstances surrounding the violation and how the mistake was discovered, and implements measures to avoid future violations.

The FTC has reported that it is contacted “several times a year” by parties who have learned that they have inadvertently violated the HSR Act in the past. Although violations occur under many different circumstances, it sees “two specific scenarios very frequently”:

– First, company executives acquire company voting shares through exercising options or warrants and fail to aggregate the value of such shares with the value of the company shares they already hold and therefore do not realize that they have satisfied the HSR size of transaction threshold test.

– Second, sometimes acquiring persons who have qualified for the investment-only exemption in the past in connection with their holdings in a company may wrongly continue to rely on that exemption when they acquire additional company voting shares not appreciating that the exemption no long applies because either they have become active investors in the company or their holdings in the company have increased above 10%.
The HSR threshold tests and exemptions are complex, with specific and detailed aggregation and valuation rules. The significant increase in the maximum civil penalty recently announced by the FTC is a timely reminder that companies and natural persons (including company executives who receive stock-based compensation) should ensure they have robust compliance programs in place to avoid violations of the HSR Act.

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Non-compete clauses in M&A transactions: 
the EU Telefónica/Portugal Telecom judgments and some best practices

A non-compete obligation which is imposed on the seller in the context of a M&A transaction can be permissible when it is ancillary to the transfer of the relevant business, that is, when it is directly related and necessary to the implementation of the deal.

In order to enjoy the fruits of the purchase of the transferred business, the buyer must be able to benefit from some protection against competition from the seller. However, non-compete clauses only comply with antitrust/competition laws when their geographical scope, duration, subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve the legitimate objective of implementing the transaction.

In two judgments dated 28 June 2016, the EU General Court upheld the European Commission’s strict approach to non-compete clauses in M&A transactions. This example is European, but the conduct at issue can raise antitrust risk around the world.

There are five key takeaways:

1. The fact that a non-compete clause is concluded as part of a legitimate M&A transaction does not automatically validate that clause under the antitrust laws.

2. It is therefore critical that any non-compete clause envisaged as part of a M&A agreement is checked to ensure that it complies with the applicable competition law rules. These limit the acceptable duration and product/geographic scope.

3. Antitrust authorities can and do investigate non-compete provisions in response to complaints and, importantly, on their own initiative. Moreover, these investigations can lead to very heavy fines. In the present case, the European Commission fined the parties over €66 million and €12 million, respectively, though the Court has now asked the European Commission to recalculate the fines taking into account only the sales of the parties relating to the services covered by the non-compete clause.

4. Liability can be strict – it may not be necessary for antitrust authorities to prove that the provision actually prevented competition that would otherwise have occurred. In the present case, the Court confirmed that the non-compete clause amounted to a market sharing agreement and could be classified as a restriction of competition “by object” with no need to assess the concrete effects of the clause on the relevant markets. Similarly, in US antitrust law, non-compete agreements between competitors that are not sufficiently ancillary to a M&A transaction can be per se illegal under Sherman Act §1.

5. Inserting language that a non-compete clause applies only to the extent permitted by applicable law is very unlikely to offer any defence against antitrust liability. In the present case, the parties had used the wording “to the extent permitted by law,” but this did not protect them.

The Telefónica/Portugal Telecom case

In 2013, the European Commission fined Telefónica and Portugal Telecom about €66.9 million and €12.3 million, respectively, for, in its view, entering into a market sharing agreement by way of a non-compete contractual arrangement to exclude or limit competition on each other’s home markets (Spain and Portugal, respectively). Remarkably, the relevant clause was included in a share purchase agreement dated 2010 whereby Telefónica had acquired sole control over the Brazilian mobile operator Vivo, which was previously jointly owned by the parties.
The clause stated: “To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, Internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof that can be deemed to be in competition with the other within the Iberian market”. That clause was to apply between September 2010 (the date of the closing of the transaction) and December 2011.

In its two judgments of 28 June 2016, the General Court upheld the European Commission’s strict approach, and stated that the non-compete clause amounted to a market sharing agreement and classified as a restriction of competition “by object”. First, the Court confirmed that the non-compete clause had the potential to restrict competition by its very nature or “by object” because it was entered into by two potential competitors in the markets for the provision of electronic communication services and television services. The Court added that these markets were liberalised and did not have insurmountable barriers to entry which would rule out any potential competition. With the clause classified as a restriction by object, it was not necessary for the European Commission to show any concrete anti-competitive effects on the market.

Second, the Court upheld the European Commission’s assessment that the non-compete clause was not ancillary to the main transaction. The clause referred to the Iberian market, whereas the main transaction referred to an operator (Vivo) whose activity was limited to Brazil. The Court clarified that, for a non-compete agreement to be “ancillary” to a transaction, it is necessary to establish: (a) whether the non-compete restriction is objectively necessary for the implementation of the main operation; and (b) whether it is proportionate to it. The assessment of the objective necessity must be an abstract analysis, which does not require an assessment of the competitive situation on the relevant market, the commercial success of the main operation or the business strategy of the parties. The requirement for a direct and necessary link should be analysed from an objective perspective, that is, the restriction of competition must be, in both product and geographical scope and duration, strictly limited to what is necessary to implement the transaction. The Court did not view as relevant Telefónica’s belief that the clause was considered essential by the Portuguese government to protect Portugal Telecom in Portugal. According to the Court, the application of the competition law rules would have been excluded only if the parties were legally obliged by the Government to adopt the relevant conduct.
Nor was the non-compete restriction ancillary to other clauses of the main agreement, namely a call option (the right of a party to buy back its shares held by the other party) and a provision for the resignation of the members of the board appointed by one company in the other company. According to the Court, the ancillary nature of a restriction should be determined by reference to the transaction or operation as a whole, rather than by reference to an artificial division of the transaction or operation into independent provisions. Ancillary restraints cannot be of more economic importance than the operation or transaction that may justify them. In any event, a non-compete commitment should have been strictly limited to what was necessary to implement the unilateral call option or resignation, whereas the non-compete clause applied to both parties.

Third, there was nothing to indicate that the non-compete clause contained a self-assessment obligation on which the entry into force of the non-competition obligation actually depended. The parties had claimed that the wording “to the extent permitted by law” in connection with other elements (such as, for example, the circumstances of the negotiations, the parties’ behaviour after the signature of the agreement, and their intent) meant that the clause should be interpreted as not imposing any obligations without a prior self-assessment of the legality of the non-compete arrangement. But the Court noted that the non-compete clause did not establish any terms and conditions that would govern this self-assessment exercise, for example the day on which the alleged self-assessment exercise was to be completed. When commenting on the wording and possible interpretation of the non-compete clause, the Court warned that there is a need to obtain “sophisticated legal advice” both in relation to the negotiation of the main transaction and in relation to any non-compete restrictions entered into in that context.

Finally, the Court held that the European Commission will have to recalculate the fines imposed on the two companies, making a more specific determination of which sales were linked to the infringement and which were not.

Best practices for non-compete clauses in corporate deals

 Appropriately limited non-compete clauses in M&A transactions are clearly procompetitive because an agreement for the sale of a company often cannot be achieved if the seller will compete with the transferred company immediately after the transfer. The seller, with its detailed knowledge of the transferred business, would be in a position to win back its former customers immediately after the transfer, and thereby deprive the buyer of the value of the business that it paid for. However, to be permissible, non-compete clauses must be necessary and proportional to the implementation of the main deal. Below we suggest four best practices for crafting defensible non-compete clauses, although specific legal advice should be taken in every case.

– First, seek guidance from antitrust/competition counsel on the specific non-compete clause. The fact that a non-compete clause is concluded as part of a legitimate M&A transaction does not necessarily remove that clause from the scope of global antitrust laws. Non-compete obligations will be assessed on the basis of whether their duration, geographic scope, subject matter and participants do not exceed what is reasonably necessary to achieve the legitimate objective of implementing the concentration – as determined by the antitrust rules in the territory affected. Different jurisdictions may have different approaches. Regarding the duration of the clause, for example, in Europe non-compete obligations are justifiable for up to three years in the case of a transfer of goodwill and know-how, and two years if only goodwill is transferred. It is sometimes possible to justify non-competes of up to five years, for example where it is proven that customer loyalty will persist for longer, or where the specific know-how transferred justifies an additional period of protection. U.S. antitrust law does not provide an iron-clad guideline, and the permissible duration depends on the facts of the case.
– Second, remember that non-competes can also be problematic in the context of joint ventures. In the EU, non-compete obligations placed on controlling JV parents are acceptable where they relate to the products, services and territories covered by the JV agreement. But this does not apply to non-controlling JV parents, and other jurisdictions may have their own approach.

– Third, consider whether any competitor or customer might complain to the relevant competition authorities or initiate a private action. Antitrust authorities can and do investigate non-compete provisions in response to complaints and, importantly, on their own initiative. M&A agreements are often public and/or subject to disclosure, and therefore any third party may see a non-compete clause and flag its existence to the relevant authorities. It is even possible that one of the parties might in the future decide to bring the issue before a competition authority in order to escape from its contractual commitments. Competition authorities might also initiate an investigation simply because they read something in the media, or because they are alerted by other authorities (as occurred in the Telefónica case).

– Lastly, do not rely solely on a caveat or qualification that the clause will only be valid “to the extent permitted by law”. Such caveats will not necessarily protect the parties from the application of the antitrust rules.
Liability for anti-competitive behaviour by your employees and outside contractors: when you are off the hook and when you are not

In its recent VM Remonts judgment, the Court of Justice of the EU has confirmed the strict liability of companies for the anti-competitive behaviour of their employees, even if the employee was acting contrary to instructions of senior management. The Court also clarified under which conditions a company can be liable for the anti-competitive conduct of its outside contractors or third-party service providers, which include when the company “could reasonably have foreseen” the conduct and “was prepared to accept the risk”. As discussed below, companies should therefore seek advice on how to secure antitrust compliance as part of an employee’s employment contract or a contractor’s services contract.

Strict liability for the behaviour of employees

Any anti-competitive conduct by an employee is attributable to their employer, and that company is held liable under EU competition law for the conduct “as a matter of principle”.

It is not necessary for there to have been action by, or even knowledge on the part of, the principal managers of the company concerned. Thus no ‘rogue employee’ defence is available, and the European Commission has even refused to accept the fact that employees were acting contrary to the instructions of their employers as a mitigating circumstance.

Thus the only option for the company is to publicly distance itself from any anti-competitive behaviour, in such a way that the other participants will recognise that it is putting an end to its participation; and to consider seeking immunity from fines by reporting the behaviour to the administrative authorities as soon as possible.

Strict liability for the behaviour of outside contractors that are employees in disguise

Physical persons may also act on behalf of legal entities in a different capacity, for instance as an outside contractor, service provider, independent consultant or agent, or a proxy holder.

In VM Remonts, the Court considered when the conduct of such contractors may be attributable to their client for the purposes of competition law liability. It confirmed that the essential question is whether the service provider, which presents itself as independent, is in fact acting under the direction or control of the company that is using its services, thus disguising what is in reality an employment relationship within the same economic unit.

Such direction or control might be inferred from the fact that the activity is carried out with little autonomy or flexibility, or from specific legal or economic links between the service provider and the user of the services.

Liability for the behaviour of genuine outside contractors

What about liability for the acts of a service provider that is genuinely independent?

In the VM Remonts case, a company, A, instructed external legal counsel to respond to a call for tenders by a Latvian municipality (for the supply of food products to educational establishments). External legal counsel in turn used a sub-contractor, which, without informing company A, had also undertaken to complete the same responses for two other companies, B and C. The sub-contractor used A’s response to prepare the tenders of B and C, even though A was not aware of this. As the Latvian court was uncertain as to whether company A could be held liable for the behaviour of its sub-contractor (as A had not authorised the actions taken by the sub-contractor and was not aware of those actions), it requested a preliminary ruling from the Court of Justice.
The Court ruled that a company may, in principle, be held liable for a concerted practice through the acts of an independent service provider supplying it with services only if one of three scenarios applies: either the service provider was in fact acting under the direction or control of the company; or the company was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct; or it could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed. In the present case, whether company A could reasonably have foreseen that its service provider would share its commercial information with its competitors (and also its readiness to accept that risk) was left for the national court to assess.

The conditions for liability set out above are not cumulative. Liability may thus be triggered when the company “could reasonably have foreseen” the anti-competitive conduct and “was prepared to accept the risk”. The concept of ‘reasonable foresight’ under the third condition could turn out to involve a relatively low threshold for liability, almost akin to an automatic (rebuttable) presumption of liability.

**At what point does liability end?**

The facts in the present case involved the delegation of work from an external legal counsel to a sub-contractor, thus implying that the liability of companies for the conduct of their contractors can extend even further down the chain to sub-contractors.

This extensive approach to liability fits with other developments in the case-law. For example, a company may be held liable through its use of a third party IT platform. The Court of Justice recently held that travel agencies that were aware of a proposal communicated by email from Eturas, a third party platform, to uniformly cap their discounts, but which failed to distance themselves from it, violated EU competition law.

**Importance of securing competition law compliance in contracts with employees and/or outside contractors**

Because of the extensive approach to antitrust liability in the EU, companies should seek advice on how to secure antitrust compliance as part of employees’ employment contracts and contractors’ services contracts. For instance, companies should assess whether to include clauses regarding antitrust compliance in contracts of employment, codes of conduct or works rules backed up by regular compliance training and audits.

Moreover, companies should not just “switch off” when they outsource an activity to external service providers, because they could incur antitrust liability through negligence – it might be found that they “could reasonably have foreseen” anti-competitive conduct that occurs and were “prepared to accept the risk”. As a start, companies might consider, for example, whether to include a confidentiality clause in the services contract relating to the information that the service providers receive from the company and/or an exclusivity clause to prevent the service providers working with several competitors at the same time. Besides regular compliance training for employees – and internal audits – companies should also consider how best to ensure that their service providers comply with the competition rules, and that any indications that they are failing in this respect are recognised and acted upon.
Antitrust cooperation between the EU and South Africa – Memorandum of Understanding signed

On 22 June 2016, the Directorate General for Competition of the European Commission (“DG Competition”) and the Competition Commission of South Africa (“CC”) signed a Memorandum of Understanding (“MoU”) on cooperation in the field of competition law and enforcement.

This is an important step evidencing DG Competition’s and CC’s intent to strengthen further levels of cooperation between them. It follows swiftly on from the CC’s conclusion in May of a MoU with the competition authorities in Brazil, Russia, India, and China. The document forms part of the now extensive and established network of MoUs and cooperation agreements between antitrust agencies across the world, and sits within the context of cooperation taking place within international organisations such as the Organisation for Economic Cooperation and Development (“OECD”) and the International Competition Network (“ICN”).

When establishing antitrust strategy, companies need to bear in mind the increasing trend for cooperation between antitrust authorities around the world. Cooperation occurs right across the board in all enforcement areas (mergers, cartels, and conduct). Cooperation in any individual case may take many forms from agencies occasionally “touching base” with each other to deep and frequent cooperation on individual cases.

Key provisions

The key provisions of the MoU include the following.

Information exchange

The authorities acknowledge that it will be in their mutual interest to exchange non-confidential information with regard to:

- Competition policy and enforcement developments in their respective jurisdictions.
- Operational issues affecting efficiency and/or effectiveness.
- Multilateral competition initiatives, such as interactions with the ICN, the OECD, the World Intellectual Property Organisation, and the United Nations Conference on Trade and Development.
- Competition advocacy, including raising awareness of companies and the wider public about competition legislation and enforcement.
- Technical cooperation, including possible exchange of staff, and the organisation of seminars and training workshops.

Coordination

The MoU states: “Should the Sides pursue enforcement activities concerning the same or related cases they will endeavour to coordinate their enforcement activities, where this is possible.”

Assistance

If either DG Competition or the CC believe that competition is being harmed by conduct in the other jurisdiction, the MoU states that one side may request the other side to initiate “appropriate enforcement activities as per its applicable competition law”. When either authority receives that type of request, it will “consider the possibility” of an enforcement action and inform the other authority of what it decides to do.

Conflicts

The two authorities have agreed that they should try, to the extent possible, to avoid creating “adverse effects” for each other through their enforcement activities. In this respect, the MoU states: “Should one Side inform the other Side that enforcement activities of the latter may affect the informing Side’s interests in its application of its competition law, the other Side will endeavour to provide an opportunity to exchange views and conduct consultations on the issues raised by the informing Side consistent with the interests of the Sides.”
Impact

This formalises an informal practice in terms of which the CC and DG Competition have been cooperating up till now, including coordinating their enforcement action. For example, in respect of the freight forwarding investigation, the authorities in South Africa, the EU and the United States coordinated their dawn raids.

In its contribution to a 2014 UNCTAD roundtable on informal cooperation amongst competition agencies, while emphasising their independence the CC noted that case handlers have enjoyed consistent interaction over the years, and cooperation would hopefully harmonise enforcement and ultimately limit conflicts in respect of decision-making.

It remains to be seen how the MoU will operate in practice, but global business can hope that, with greater cooperation between DG Competition and the CC, investigations may be more efficient, and outcomes and remedies more consistent.
**When an information exchange among competitors is not illegal: the Italian TV services case**

The Italian administrative tribunal of Lazio region (tribunale amministrativo regionale del Lazio, “TAR”), the sole responsible court for the appeal of the Italian Competition Authority (“ICA”) decisions, has recently provided detailed clarification regarding when information exchange between competitors is not illegal.

In a series of judgments regarding the TV post-production services case, the TAR overturned the conclusions (and subsequently the fine) that the ICA had imposed on over twenty post-production television services companies and their trade association for exchanging information about their bids to the Italian State-owned TV (the Radio Televisione Italiana or RAI). The Italian judges define the scope of the information that can be qualified as “strategic”, set a high standard for proving collusion between competitors, and impose a careful analysis of the restrictive effects that an information exchange may have on competition taking into due account the characteristics of the relevant market and, in particular, the market power of the involved companies and their customer.

The TAR judgment provides important clarifications regarding the perimeters of legal information exchange between competitors. The present judgment adopts a different legal test than the one adopted by the Italian supreme administrative court (Consiglio di Stato, the second and final level of appeal for ICA decisions) in a 2010 judgment that the ICA has been constantly relying on in the past years to defend their very rigid stance vis-à-vis information exchange cases. Moreover, this judgment is a welcome clarification for all of Europe at a time when recent decisions illustrate that information exchange is increasingly under the antitrust enforcement radar with not always consistent outcomes.

**Information exchanges as a new frontier of antitrust enforcement**

Several antitrust regimes, in particular in Europe, consider information exchange of competitively sensitive information as a hard-core antitrust violation. Even in those jurisdictions where information exchange is not presumptively illegal, for example in the United States and Canada, information exchange may lead to a government investigation and an avalanche of civil lawsuits with substantial damages claims (see our previous alert on “Global Laws Inconsistent when Competitors Talk Among Themselves”). Short of constituting an explicit agreement (written or oral) to fix prices, in Europe an information exchange can constitute an unlawful “concerted practice” if it reduces uncertainty in the market and thereby facilitates collusion. That requires that the data exchanged is “strategic”, which is defined very broadly by the European Commission’s Guidelines on Horizontal Agreements as “data that reduces strategic uncertainty in the market”.

EU competition law prohibits certain practices under the doctrine of “concerted practice by object”: exchange between competitors of their individualized plans regarding future prices or output would normally be considered anti-competitive by its very nature or “by object” and is deemed presumptively illegal. Unless the presumption is rebutted, the practice may be treated as hard-core cartel activity, which carries the potential for substantial fines and follow-on damage claims.

To give a taste of how strict enforcement can be in this area, European enforcers found as examples of a hard-core violation of EU competition law, and imposed high fines for, a group of mobile phone companies having a single discussion about how much to pay their dealers (T-Mobile Netherlands case), banana importers discussing various factors that could influence demand for bananas (2015 Dole case), and a travel booking platform informing their members that discounts for online bookings are limited to 3% (January Eturas decision).

Several national competition authorities in the EU have taken a similar approach. For example, most recently, the U.K. competition authority opened a case against 5 agencies for fashion models and their trade association for allegedly exchanging confidential future pricing information. So have enforcers in other countries, including Brazil (where information exchanges may be prosecuted as a crime) and China.
When competitors exchange information that is not individualised data regarding intended future prices or quantities, however, the competition authorities will assess the likely effects of the information exchange on competition. This assessment will be conducted on a case-by-case basis as the results of the assessment depend on a combination of various case-specific factors. This is what happened in the Italian case described below.

**Definition of the perimeter of illegal information exchanges**

This judgment of the Italian judges of 6 June 2016 annulled the decision of the ICA which last year had fined 21 small-sized companies offering post-production television services and their industry trade association (New Italian Broadcasting) with a fine of almost €800,000 for an information exchange and a coordination of their offers to the Italian State-owned TV (the *Radio Televisione Italiana* or *RAI*). In a first phase the parties had allegedly exchanged competitively sensitive information through their trade association that collected and circulated data, and recommended to their members not to offer too low bids to the Italian TV station. In a second phase, the parties allegedly intensified their contacts and exchanges, in particular by meeting twice. The minutes of one meeting included a proposed list of the hourly prices of TV services that the industry association would have shared with the TV station on behalf of its members.

**Historic information in the public domain**

This TAR judgment provides important clarity on the scope of permitted information exchange between companies under EU competition law (Article 101 of the Treaty) and its Italian equivalent (Article 2 of the Italian competition law). The ICA case is about a violation of the Italian competition law, but both the ICA and the TAR refer in several instances to European legislation and case law.

The TAR clarified that information exchanges are illegal only if the Authority can provide clear evidence that the information exchange can help companies to predict their rivals’ future commercial strategies. EU competition law prohibits these practices under the doctrine of “concerted practice by object”, which the Italian judges refused to apply in the present case.

According to the TAR, the data exchanged (i.e., the tenders, the starting price for the bids, and the bids submitted by each company) were not strategic because they could not reveal the future commercial strategies of the companies. Firstly, the data concerned past tenders and, in the sector of post-production TV services, the tendering entity (the Italian TV) decided the starting price for the bids for each tender and the companies that could submit an offer for all those tenders. The present TAR judgment adopts a different legal test than the one adopted by supreme administrative court (*Consiglio di Stato*) in the IAMA Consulting judgment where the *Consiglio di Stato* had stated that “it is obvious to all that the constant acquisition of data on the commercial conditions offered by competitors in the recent past reveals precious information to adapt its own commercial strategy in alignment with others as the [life and social security insurance] sector is not characterized by changes in prices and commercial terms”.

Secondly, according to the TAR, the exchanged data did not have a real element of secrecy because the information would have been accessible to all players in a competitive market (even though in the present case the information remained secret because the tendering entity, the Italian TV, did not want to disclose it). In this context, it is interesting to note that the Court of Justice in its *Dole* decision stated that the fact that the exchanged information are publicly known or could be collected otherwise from the market or from the customers is not relevant in assessing the legality of the conduct. The Italian *Consiglio di Stato* in its IAMA
judgment had adopted a similar reasoning. Enforcers should adopt a practical approach and recognize that, when the information is already out there on the market, and is even shared with customers (which was the case in the present case, see below), the exchange of that information does not necessarily enable companies to be aware of future market strategies of their competitors.

Lastly, according to the TAR the trade association communicated to the Italian TV station (i.e., the only customer of the TV services companies) the data that the trade association had collected from its members (because the TV station wanted to have such data as a point of reference for its tenders).

Collusion must be carefully proven

As the TAR found that the exchange did not constitute a violation by object, it went on to assess any restrictive effects that the information exchange could have on competition. The TAR observed that the ICA could not bring to the table any written evidence proving collusion, not even serious, precise and consistent indices of collusion.

Firstly, the ICA had only proven the existence of unilateral acts such as the invitations and recommendations by the trade association to increase prices (or not to price the bids too low). Even if such recommendations were documented in the minutes of a meeting, it was unclear who had recommended and who would have accepted the invitation.

Secondly, the TAR found that the price increase trends in the relevant tenders, or the parallelism of the offers submitted by the companies, did not constitute sufficient evidence of collusion. This is because the price increases had been adopted also from other companies which had not been sanctioned by the ICA.

Thirdly, the TAR found that the ICA’s reasoning did not have a “narrative consistency”, and in particular did not consider possible alternative explanations of the relevant conduct. The ICA should have taken into account the characteristics of the relevant market where the information exchange may actually solve problems of information asymmetries. In particular, the ICA had failed to consider the fact that the tendering entity (the Italian TV) was dominant on the relevant sector in a situation of “monopsony” where it represented the only customer of the post-product TV services companies.

Companies need to address information exchange in their compliance programmes

The judgment provides important clarity on the scope of permitted information exchange between companies. The exchange of historical data may not have a restrictive effect on competition, though that is to be assessed in relation to the relevant market and its characteristics. For instance, recent data may reveal future commercial strategies in certain industries.

The compliance risk of information exchanged through third parties is particularly acute since even antitrust savvy business executives may not be aware of the possible risks of information exchanges, especially when the sharing of information happens through an industry association. This risk should be addressed in detail in competition compliance programmes.

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Global merger control strategy

The European Commission emphasises the important role that merging parties can play in cooperation between antitrust agencies

The European Commission recently published a policy brief on international enforcement cooperation in mergers (the “EC Policy Brief”).

The EC Policy Brief presents the key principles for effective cooperation between antitrust agencies in merger enforcement which were set out in the Practical Guide to International Enforcement Cooperation in Mergers (the “ICN Cooperation Guide”) issued by the International Competition Network (“ICN”), and explains how those principles have been applied in recent transactions reviewed by the European Commission. The ICN Cooperation Guide was adopted by the ICN at its Annual Meeting in Sydney in April 2015. The ICN is a network that brings together over 130 antitrust agencies from around 120 jurisdictions around the world. The European Commission took a leading role in formulating the ICN Cooperation Guide, and is actively promoting it.

The EC Policy Brief emphasises that cooperation between antitrust agencies is not just a matter for the agencies themselves, and that merging parties and third parties also have key roles in facilitating cooperation between different agencies.


Together these documents provide an important reminder for merging parties of the need to devise and execute a coordinated global strategy for seeking merger control clearances, including in terms of the timing of filings and preparing remedies.

A mass of merger control regimes

There has been an explosion in the growth of merger control regimes around the world in the past decade. Along with the growth in merger control regimes has come a significant increase in the extent of cooperation between antitrust agencies. There are a number of bilateral agreements between antitrust agencies, and there is also increasing dialogue on a multilateral basis within international organisations, such as the Organisation for Economic Cooperation and Development (OECD) and the ICN. It was against this background that the ICN adopted in 2015 the ICN Cooperation Guide and in 2016 the ICN Merger Remedies Guide, in order to provide guidance on merger enforcement cooperation for antitrust agencies seeking to engage in such cooperation, as well as for merging parties and third parties seeking to facilitate cooperation.

Mergers are increasingly subject to review by multiple antitrust agencies across the world. The EC Policy Brief highlights that “multi-jurisdictional mergers, with their potential risk of increased costs, burdens and divergent outcomes for the merging parties, have become a frequent reality.” The EC Policy Brief recognises that effective cooperation between antitrust agencies is part of the answer to these challenges. It states that cooperation facilitates consistent outcomes, and may increase investigative efficiency by reducing duplication of work, delays and burdens for the merging parties, third parties and the antitrust agencies. It notes that merging parties also have the ability to facilitate cooperation between antitrust agencies for their own benefit, including by granting waivers to enable antitrust agencies to discuss confidential information.

The overarching principles of cooperation

The EC Policy Brief comments on the following principles of merger enforcement cooperation.

Voluntary nature of cooperation and flexibility.

The EC Policy Brief highlights that merger enforcement cooperation is voluntary and does not limit antitrust agencies’ ability to take their own enforcement decisions independently. It points out that in a specific merger case there is significant flexibility in the way that agencies can cooperate with each other, and that this may differ from one case to another.

Need for and utility of cooperation.

The EC Policy Brief comments that the need for and utility of cooperation varies from case to case depending on the
facts and the issues raised by a particular merger. It states that cooperation between agencies is especially beneficial in cases that raise competitive issues of common concern. It notes that this is particularly the case for mergers affecting global or cross-border regional markets, but that it may also be relevant “where the geographic scope of the markets is confined to the respective jurisdictions if, for instance, competition problems in different national or regional markets are remedied through the divestiture of a global business”.

Role of the merging parties. The EC Policy Brief notes that merging parties have a key role to play in facilitating cooperation between antitrust agencies, “in particular when cooperation requires aligning the timing of the review processes or the exchange of confidential information”. It notes the importance of “early and constructive engagement of merging parties”.

Putting cooperation principles into practice

The EC Policy Brief recommends careful planning and a coordinated approach to filing obligations around the world, in particular in the following respects.

− Initial contacts. Merging parties are recommended to provide to agencies as early as possible sufficient information about a merger and the filing obligations in other jurisdictions so that contacts between reviewing antitrust agencies can start “if only to touch base on status and timing of a transaction”.

− Information sharing. Merging parties can facilitate information sharing by giving waivers of confidentiality. The EC Policy Brief emphasises that the European Commission will ask for and make use of waivers “in a responsible manner”. It notes that waivers are not needed in every case, as there are types of information that can be exchanged between antitrust agencies without a waiver. The EC Policy Brief states that this includes:
  − Publicly available information regarding the industry/sector or the merging parties or third parties
  − Non-confidential aspects of prior relevant investigations or decisions
  − Information regarding an antitrust agency’s process (such as timing)
  − Aggregated results of a market investigation without the identification of the individual views of customers or competitors
  − Antitrust agency views on market definition, theory of harm, and competitive effects.

− Timing alignment. The EC Policy Brief notes that merging parties can help agencies cooperate at key decision making stages by timing their filings appropriately. This does not necessarily mean that filings in the various jurisdictions need to be made at the same point in time. The EC Policy Brief also notes that it can be helpful if merging parties avoid provisions in their merger documents that require notifications to be made within a specified period of time.

− Substance. The EC Policy Brief notes that discussion between the reviewing antitrust agencies which compares the different antitrust agencies’ investigative approaches, in particular on investigative planning, the approach to gathering of evidence, analytical methods and economic models, can help avoid divergent outcomes. It states that merging parties can help by ensuring consistency in their substantive submissions to the various reviewing agencies.

− Remedies. The EC Policy Brief acknowledges that cooperation between antitrust agencies in remedy design increases the likelihood of non-conflicting remedies being accepted by antitrust agencies and minimises the risks of subsequent difficulties in their implementation. It notes that remedies accepted in one jurisdiction may have an impact on another including in cases in which the product or geographic markets or competitive effects of the merger are not identical.
The EC Policy Brief suggests that the remedy design process is more effective and efficient when merging parties have facilitated cooperation between reviewing antitrust agencies, “particularly through timing alignment and/or waivers of confidentiality”. The EC Policy Brief refers to paragraph 40 of the ICN Cooperation Guide, which states that facilitation can be achieved, for example, “by helping to align timing of the substantive reviews, providing consistent information, providing waivers and coordinating remedy proposals, where appropriate”.

The EC Policy Brief recommends continued cooperation between antitrust agencies throughout the remedy implementation stage, and notes that such cooperation may include the appointment of common trustees, and common approval of the same purchaser for divested businesses.

The ICN Merger Remedies Guide also emphasises the importance of merging parties taking an active role in assisting cooperation between antitrust agencies with respect to remedies. The ICN Merger Remedies Guide sets out detailed guidance for considering key aspects of remedies, including remedy design, implementation, considerations regarding timing, and international cooperation. It builds on the principles set out in the ICN Cooperation Guide. The ICN Merger Remedies Guide emphasises the importance of merging parties assisting in the alignment of respective remedy procedures, for example, by helping to align “key decision-making stages, including remedy decision-making, through timing of their notifications or responses to information requests, providing confidentiality waivers, and requesting or agreeing to timing extensions.”

Key take-away – a coordinated global strategy

For any significant global merger, it is now common for the merging parties to file for approval in 20 or more different merger control regimes around the world. Formulating a global strategy for coordinated multiple antitrust agency reviews is critical. Taking account of the increasing cooperation between the antitrust agencies reviewing the same merger is a key part of such a strategy. Components of such a global strategy for merging parties include:

- Early determination for where filings are required, bearing in mind that jurisdictional tests vary across the world (turnover, market share, asset based tests, etc);
- Consideration of differing review timetables in different jurisdictions;
- The formulation and presentation of consistent substantive cases to the antitrust agencies;
- The granting of confidentiality waivers, where appropriate; and
- The formulation and presentation of consistent remedy proposals.

Effective implementation of a coordinated global merger control strategy can have clear benefits for all concerned, avoiding inconsistent outcomes, and the reduction of review burdens and costs.

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De-Regulating the sharing economy: European Commission publishes guidelines to promote national harmonization

On 2 June 2016, the European Commission published an official Communication, “A European agenda for the collaborative economy”, which provides guidance on how existing EU laws affecting the sharing economy (also known as the “collaborative economy”) should be interpreted across Member States.

In the sharing economy, private individuals provide on-demand services to other people, without intermediaries.

This peer-to-peer model is facilitated by online platforms which act as match makers. Since this new economy disrupts traditional business models, existing businesses face new competition from technology start-ups that match customers to the crowd.

The Commission’s new guidance, a complement to its Digital Single Market Strategy, represents a substantive step towards embracing the new opportunities presented by the sharing economy, and it encourages Member States to clarify their own rules so as to allow the spread of sharing economy platforms across the EU. Rather than increase “Brussels red-tape”, the Communication expresses the Commission’s drive to create a single digital market and reduce regulatory burdens for pan-European sharing economy platform operators.

Moreover, the Communication puts a marker against national patchwork regulation in the field of e-commerce and new business models. Just recently the German and French competition authorities rushed ahead with a thought leadership document on “Competition Law and Data”, while the Commission has only recently published the initial findings of its e-commerce sector inquiry. The Communication on the sharing economy demonstrates that the Commission is willing to make use of its legal options to ensure a consistent approach regarding the application of antitrust and regulatory law in the field of Tech, Big Data and Industry 4.0 activities.

In more detail, the Commission provides guidance on several topics:

**Market access requirements**: Member States should review quantitative restrictions in transport sectors. Absolute bans of an activity should only be applied where less restrictive means of achieving the same policy objective are not available (e.g. limiting the number of days per year a property can be offered for short-term rental to address concerns related to the long-term rental market). Business authorisations (or minimum quality standards) should be required only where justified and proportionate, while not favoring one business model over the other.

In assessing proportionality, Member States should take into account e.g. rating and reputational systems, which may address the legitimate public policy concerns and limit the need for further regulation. Platforms that provide solely a match-making function should not themselves be subject to business authorisations and Member States should differentiate between “occasional” service providers and those that use the platforms to provide services in a professional capacity. Where service providers do need authorisations, administrative procedures and formalities must be “clear, transparent and not unduly complicated”.

Consumer protection: Member States should not impose disproportionate obligations on private individuals who provide services only on an occasional basis. On the other hand, EU consumer protection laws apply to platform operators and service providers who provide services as a business or profession. In determining whether a service provider in the sharing economy operates as a business, Member States should look at the frequency of services provision, whether services are provided at cost / in exchange or for profit, and the level of turnover generated by the service provider for that particular service.

Labor law: While labor law mostly falls under national rules, in assessing whether an employment relationship exists, Member States should consider criteria such as the existence of a subordination link (whether the platform determines the choice of activity, remuneration and working conditions of the service provider), the nature of the work (is the work done regularly; is it non-marginal), and their remuneration (is it more than just compensation for costs). If an employment relationship is deemed to exist, the service provider is entitled to minimum protections (e.g. limits on working time, annual leave, protection against discrimination). Member States are encouraged to establish minimum thresholds under which service providers operating on a non-professional peer-to-peer basis, could avoid the regulatory requirements imposed on professional service providers.

Sector specific regulation: Whether a platform operator is considered a mere match-maker, or whether it itself can be considered a professional service provider, and thus subject to sector-specific rules governing these services (e.g. related to health and safety) should be established on a case by case basis. Relevant assessment criteria include the way the price and other key contractual terms are set, the ownership of key assets, the assumption of risks and costs, and whether an employment relationship exists with the individual service providers.

Tax: Service providers and platform operators must pay their fair share of taxes. This includes personal income, corporate income and Value Added Tax as applicable. Platform operators should cooperate with national tax authorities to facilitate tax compliance while respecting data protection legislation.

Direct and intermediary liability: Platform operators should not be exempt from liability for any service they themselves offer (such as payment services). However, they generally shouldn’t be liable for information posted by service providers and stored on their platforms (in line with the Commission’s e-Commerce Directive). Member States cannot force platform operators to generally monitor or to actively seek out illegal activity.

The Communication is a step towards European harmonization of a currently fragmented approach to regulation of the sharing economy. While not legally binding, companies can make use of the guidance in order to fend-off restrictions perceived as being too onerous by Member States.

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EU merger control complications for Chinese SOE transactions

The European Commission recently published its decision clearing the joint acquisition by Electricité de France S.A. (EDF) and China General Nuclear Power Corporation (CGN) over a group of companies active in the nuclear energy sector.

The decision provides a warning that transactions involving a Chinese State-owned enterprise (SOE) may trigger a mandatory notification to the European Commission in unexpected circumstances, such as when the Chinese SOE that is party to the transaction has little or no presence in the EU. It also illustrates the potential for certain future transactions involving a Chinese SOE to face lengthy, burdensome, and complex merger control review by the European Commission.

Must the European Commission review the transaction?

The European Commission has the jurisdiction to review transactions where the parties to the transaction have sufficient sales in the EU. This will be where the parties’ combined global turnover is over 5 billion Euro, and the aggregate EU-wide turnover of each of at least two of the parties is more than 250 million Euro. Alternatively, this will be where the parties’ combined global turnover is at least 2.5 billion Euro, and each party has at least 100 million Euro turnover in the EU (and parties have a combined turnover of over EUR 100 million Euro in at least three EU Members States in which they individually have over 25 million Euro).

Filing under the EU Merger Regulation is mandatory and suspensory. Transactions which require notification must be cleared before they can be implemented. Failure to do so can lead to significant fines.

When the turnover of SOEs is being calculated, the question is whether the turnover of other SOEs should be taken into account when calculating the turnover of the SOE involved in the transaction. There is limited guidance in the EU Merger Regulation itself, but recent cases have established that it is necessary to assess whether SOEs have an independent power of decision. Factors that should be considered as part of this assessment include:

- the SOE’s autonomy from the State in deciding strategy, business plan and budget, and
- the possibility for the State to coordinate commercial conduct by imposing or facilitating coordination.

In this case, the parties argued that CGN is independent from the State Assets Supervision and Administration Commission (SASAC) which administers Chinese SOEs at the central level. The European Commission rejected their arguments. After a review of the Chinese laws and regulations on SOEs as well as the information on Central SASAC’s website (in English, it seems), the European Commission concluded that Central SASAC has influence on CGN’s major decision making, and that CGN does not enjoy autonomy from the State in deciding major matters like strategy, business plan or budget.

The European Commission considered, in particular, Central SASAC’s rights with respect to the appointment and removal of senior management, annual performance reviews of management, annual investment plan reporting, entitlements to returns from assets, and participation rights in strategic matters and supervisory rights. According to the European Commission, the absence of cross-directorships between CGN and Central SASAC/other Chinese SOEs, as well as the existence of confidentiality provisions between Chinese SOEs, did not preclude Central SASAC from influencing CGN’s commercial strategy.

In addition, the European Commission concluded that within the energy sector (particularly the nuclear industry), the Chinese State through Central SASAC is able to require or facilitate coordination between Chinese SOEs. It used as a basis for this conclusion the establishment of the China Nuclear Industry Alliance, which a third party described as “directed by the Chinese government,” as well as various agreements that CGN has signed.
As a result of this analysis regarding independence, the European Commission concluded that, at least as regards SOEs controlled by Central SASAC active in the energy sector, the turnover of all such companies should be aggregated for the purposes of assessing jurisdiction. The turnover of energy industry SOEs was sufficient to trigger jurisdiction under the EU Merger Regulation, so the European Commission left open whether other SOEs in different industries, or local SASACs — that is, the local offices of SASAC in the provinces in China — and the SOEs controlled by them should also be aggregated.

In recent cases involving SOEs, the Chinese SOE involved in the transaction had sufficient EU turnover to trigger the European Commission’s jurisdiction. In this case the analysis of which SOEs to include for the purposes of turnover calculation was crucial as CGN did not itself have sufficient turnover in the EU by itself.

**How does the European Commission carry out its competitive assessment?**

The question of which SOEs to take into account is also critical from a substantive perspective in analysing the competitive effects of a transaction. If the European Commission considers than an SOE should form part of a group of other SOEs, it will take into account the activities of the other SOEs when analysing competitive effects.

In this case, the European Commission took into account the energy-related activities of all central SASAC-owned SOEs for its competitive assessment. It left open, however, the final question of which companies should be considered in the competitive assessment (CGN, Chinese SOEs controlled by Central SASAC and/or Chinese SOEs controlled by local SASACs) as the transaction did not lead to competition concerns irrespective of the assessment on this point.
Impact

This case serves as a reminder of the challenges of EU merger control clearance for transactions involving a Chinese SOE. The key takeaways are:

- A filing to the European Commission may be triggered not as a result of the EU turnover of the SOE involved in the transaction, but as a result of the EU turnover of other Chinese SOEs. This makes mandatory merger control filings to the European Commission easy to miss.

- The European Commission notification process may be particularly burdensome. In addition to a Chinese SOE having to provide information about its own activities, it may have to provide information about other Chinese SOEs in the same sector, which may be difficult to access. This information burden is likely to mean that the timetable for the preparation of notification needs to be longer than usual, and involve lengthy pre-notification discussions with the European Commission.

- Substantive assessment of the transaction may not always be straightforward, as multiple Chinese SOEs may be included in the competitive assessment. Whilst in the CGN/EDF joint venture, taking into account the activities of other Chinese SOEs did not lead to complications, the same may not be true for future transactions where Chinese SOEs acquire interests in other foreign businesses.

Beyond EU merger control, the European Commission’s EDF/CGN decision and similar past decisions may have broader implications for Chinese SOEs from an EU competition law perspective: as the “other side of the coin,” the conclusion by the European Commission that at least some SOEs form a single “economic unit” (under SASAC’s direction) may also mean that “intra-group” relationships (that is, within the “economic unit”) are not subject to EU competition law.

Such an interpretation could have far-reaching implications, for example that mergers among, or restrictive agreements between Chinese SOEs within the same economic entity would not be subject to EU competition law. It remains to be seen how far the European Commission is willing to take its interpretation of the relationships between Chinese SOEs and their legal implications.

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The antitrust agencies have made it clear that hospital mergers are a high enforcement priority. A new lawsuit, *United States v. Carolinas Healthcare System*, brought by the Department of Justice (DOJ) and the North Carolina Attorney General signals that hospital contracting practices also may be subject to challenge.

The complaint filed on 9 June 2016, alleges that anti-steering provisions in the contracts of Carolinas Healthcare System (CHS) violate Section 1 of the Sherman Act. According to the complaint, CHS, a hospital system with an alleged 50 percent market share in the Charlotte area, includes provisions in its contracts with Aetna, Blue Cross Blue Shield, Cigna, and United that prevent the insurers from steering patients to lower priced hospitals. First, the contracts “directly” restrict steering by preventing the insurers from offering either narrow networks that exclude CHS or tiered networks that incentivize patients to use CHS’ competitors. Second, the contracts “indirectly” restrict steering by preventing the insurers from providing cost and quality information that patients could use to seek out lower cost or higher quality healthcare services. The complaint claims that these anti-steering provisions insulate CHS from competition, allowing CHS to maintain higher prices.

DOJ’s support of “selective contracting” by insurers is nothing new. DOJ previously warned health care providers against the use of anti-steering and tiering mechanisms in the 2011 joint DOJ and FTC Accountable Care Organizations Antitrust Policy Statement. That statement cautioned ACOs against four types of conduct, including “preventing or discouraging private payors from steering patients to certain providers, such as through “anti-steering,” “anti-tiering,” “guaranteed inclusion,” “most favored nation,” or similar clauses. In addition, DOJ’s efforts to target anti-steering conduct in this case mirror those taken by DOJ in the context of the credit card industry, as well as a 2011 lawsuit in which DOJ challenged a hospital system’s insistence on exclusive contracts with health insurers.
DOJ’s actions in this lawsuit signal further strong support for health insurer steering and transparency initiatives. The use of tiered or narrow provider networks to control escalating provider costs has expanded significantly in recent years on the Affordable Care Act health insurance exchanges. New efforts also are underway to improve cost and price transparency for patients.

DOJ’s lawsuit is noteworthy because it appears to strongly embrace the increasing use of these tools to improve the efficiency of healthcare delivery.

Providers have challenged insurer decisions to exclude them from provider networks under the antitrust laws in private lawsuits that are currently percolating through the courts. Often such challenges fail (absent evidence of collusion by the payers) because the exclusion is considered to be a natural result of selective contracting by the health plan in an effort to lower costs, and the plaintiff cannot show an adverse impact on competition. The Carolinas lawsuit can be seen as further support for selective contracting, and an attempt to hold providers accountable for conduct that impedes arrangements that ultimately result in the exclusion of providers from narrow or tiered provider networks. Indeed, the complaint alleges that, as a result of CHS’ restrictions, “individuals and employers in the Charlotte area pay higher prices for health insurance coverage, have fewer insurance plans from which to choose, and are denied access to consumer comparison shopping and other cost-saving innovations and more efficient health plans that would be possible if insurers could steer freely.”

The lawsuit has major implications for both health plans and healthcare providers:

- While much attention has focused on efforts by the FTC and DOJ with respect to hospital and health plan mergers, respectively, the case highlights that DOJ will actively scrutinize provider conduct as well.

- The case reaffirms DOJ support of selective contracting and shows DOJ’s willingness to fight aggressively to remove impediments to steering patients to low cost or high quality providers through narrow or tiered provider networks.

- The case shows that DOJ also views transparency initiatives on price and quality as a meaningful means of improving the efficiency of healthcare delivery, and amount to an “indirect” steering tool.

- Health care providers contemplating contractual restrictions on insurer steering should ensure that such restrictions are reasonably necessary to achieve legitimate business objectives.

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On 14 June 2016, China’s State Council made public the Opinions on Establishing a Fair Competition Review System in the Development of the Market Regime (“Opinions”). The Opinions were approved on 1 June.

The “fair competition review system” forms part of China’s broader efforts to tackle so-called “administrative monopolies,” a term used for various forms of government action or inaction leading to anti-competitive results. Abuse of administrative power with anti-competitive effects – the more technical term for “administrative monopolies” – is prohibited under the Anti-Monopoly Law (“AML”). This law also prohibits a number of specific manifestations of abusive government conduct.

However, the Opinions go beyond the AML framework, both in terms of process and substance.

**Review process**

The “fair competition review system” works somewhat like an “advocacy” type of mechanism, only in a decentralized way. In many foreign jurisdictions, “advocacy” is used to indicate a process whereby antitrust authorities attempt to influence the rule- and decision-making processes by other government bodies to prevent anti-competitive outcomes.

With the new system in China, each government body (and entity with a public policy mandate) is required to conduct a self-review when formulating new business-related rules or policies, in order to check whether they may give rise to anti-competitive effects. In other words, each body is being told to police itself.

The only exception is the State Council, where the actual drafting body, typically a ministry or commission under its supervision, is responsible for conducting the “fair competition review.”

The scope of the review mechanism is broad, including:

- all types of business-related rules and policies (including administrative regulations issued by the State Council)
- all levels of government (the obligations apply to central and provincial-level bodies from July 2016, and to city and county-level bodies from 2017)
- not only will new rules and policies come under scrutiny, but existing ones are also required to be re-examined.

Indeed, each government body is required to conduct a periodic review of its rules and policies: the Opinions encourage government bodies to outsource the assessment to third parties. The report produced is required to be made public.

Importantly, during its review of new rules and policies, the government body must consult with interested parties or launch a public consultation before they are enacted.

The Opinions do not provide for any specific sanctions if a government body does not follow the Opinions. That said, the Opinions vaguely speak of personal consequences under Party and government disciplinary rules for individuals who contravene the Opinions.

Another interesting facet is that the Opinions empower the three antitrust authorities, the National Development and Reform Commission (“NDRC”), the Ministry of Commerce, and the State Administration for Industry and Commerce (“SAIC”), together with the State Council’s Legislative Affairs Office to formulate implementing rules for the self-review and other aspects of the new system (the Anti-Monopoly Commission, the high-ranking antitrust policy body, is also mentioned at one point in the Opinions but its role in this new system seems unclear).

**Substance of review**

The Opinions feature four categories of benchmarks for the substance of the “fair competition review” (each with a set of specific benchmarks/prohibitions):

- market access (for example, no unreasonable or discriminatory market barriers)
- free flow of goods (for example, no discrimination against non-local companies in tenders)
- impact on costs (for example, no individual subsidies or tax breaks)
- impact on operations (for example, no undue intervention in market pricing).
Some of the substantive rules mirror, or are inspired by similar prohibitions in the AML. On various occasions, the Opinions even directly refer to the AML. Other provisions, however, cover new ground. For example, there appear to be a set of rules aiming to curb favorable tax treatment by local governments not approved by the State Administration of Taxation for the benefit of specific companies. In a roundabout way, it could be argued that through the Opinions, China is introducing at least the basis of a “State aid” system similar to that in the European Union (where advantages selectively granted by government to companies, thereby distorting competition, can be unlawful under antitrust rules).

Interestingly, as with the AML provisions applicable to companies, the Opinions provide for “exemptions” to the prohibitions, in particular:

- to safeguard national economic and cultural security, or defense-related construction
- for social security purposes, such as poverty alleviation or disaster relief
- for social public interests, such as energy conservation or environmental protection, and
- other circumstances prescribed by laws and regulations.

The last point, of course, leaves the door open for further exceptions to be added in the future through legislation.

Impact of the new system

The adoption of the Opinions and the launch of the “fair competition review system” are significant. They create a new policy (working like “soft” law) outside, or alongside, the AML framework.

The main driver behind this development may have been NDRC’s antitrust bureau, which has been dealing with numerous “administrative monopoly” cases in the recent past (as has SAIC’s antitrust bureau). The AML provides relatively weak sanctions (only recommendations) for anti-competitive government actions, hence the need for a system with “more teeth.”

For domestic and foreign companies alike, a major advantage of the new system (if properly and even-handedly enforced – which cannot be taken for granted at the outset) would be the additional transparency it could bring. Businesses would have greater opportunities to be consulted, and to feed into the normative processes. They would face fewer barriers to trading across administrative divisions, as the system challenges “administrative monopolies” through local protectionism.

Whether China’s call for “doctors to heal themselves” will succeed in practice remains an open question, especially when implementing the Opinions would cut across powerful local interests. It is, however, a positive start and a step in the right direction to spread the “fair competition” message down throughout all layers of government in China.
On 26 May 2016, the People's Court in Shanghai's Pudong New Area handed down its judgment in *Hantao v. Baidu*, in which Baidu was sued for inappropriately using information uploaded on dianping.com, a Hantao-owned website and app.

The court decided in favor of the plaintiff, and laid out a possible analytical framework for assessing unfair competition aspects in the production, collection and use of information in the Internet space.

**Background and findings**

Hantao operates dianping.com, a classified information site that provides independent consumer reviews of local services such as restaurants, hotels etc. Baidu is the leading search provider in China, and also provides online mapping (Baidu Map) and Q&A (Baidu Zhidao) services. Baidu was found to have “scraped” consumer reviews from dianping.com (i.e., appropriating some of the dianping.com content through its search technology), and present dianping.com consumer reviews in Baidu Map and Baidu Zhidao, without the authorization of Hantao.

The Pudong court decided that the unauthorized use of consumer reviews from dianping.com violated Article 2 of the Anti-Unfair Competition Law (“AUCL”). The AUCL has a broad scope, which includes specific prohibitions on various types of unfair practices. For practices that do not fall under the specific prohibitions in the AUCL, past cases suggest that the courts tend to apply the catch-all clause in Article 2, which requires companies to honor the general principles of willingness, equality, fairness, honesty and good faith, and widely-recognized commercial ethics.

In relation to the first requirement, the court followed “traditional” Article 2 “case law” which reads a requirement that the plaintiff and defendant be competitors into the law. Similar to past Internet cases, the Pudong court took a broad approach in finding a competitive relationship, holding that companies from different sectors may be considered competitors for the purposes of the AUCL. The decision suggests that, in the Internet sector, companies that target the same group of consumers may be viewed as competitors, regardless of the nature of the specific services they provide.

In relation to the second requirement, the court found that Baidu had collected consumer reviews from dianping.com, and presented some of them in full on Baidu Map and Baidu Zhidao. This practice allowed Baidu users access to the consumer reviews without visiting dianping.com. As a result, the court held Hantao had suffered losses of user visits and potential business opportunities.

**Collection and use of third-party information**

In relation to the third requirement, the court’s analysis was most interesting. Here, the court evaluated the legitimacy of Baidu’s collection and use of information by looking at the following factors: (1) whether the information at stake had commercial value and conferred a competitive advantage; (2) how difficult was the information to obtain and what costs Hantao incurred in that regard; (3) whether Hantao’s original collection and use of the information violated the law, commercial ethics or public interests; and (4) whether Baidu’s use of the information was legitimate.
– On (1), the court considered consumer reviews to be valuable resources and to confer a competitive edge upon Hantao. In particular the court found that, through the accumulation of consumer reviews, Hantao managed to assist consumers in making informed decisions and provide vendors with feedback from consumers.

– On (2), the court found Hantao to have invested a significant amount of time and effort in setting up a functioning consumer review system and accumulating consumer reviews.

– On (3), the court considered that Hantao’s original acquisition, holding and use of the consumer review information had not violated the law or commercial ethics.

– On (4), Baidu was found to collect consumer reviews from dianping.com and use some of them in full in its own products. According to the court, Baidu’s collection and use of the dianping.com information was a “free ride” on Hantao’s efforts, and thus ran against well-recognized commercial ethics and the principles of honesty and good faith. Interestingly, the court also indicated that an alternative solution, which Baidu had adopted for one of the earlier mobile versions of Baidu Map, would not breach the law: providing only a limited number of consumer reviews; copying only parts of the reviews; and including a link to the original source at dianping.com.
Impact of ruling

The Hantao v. Baidu judgment is interesting as it focuses on a rather novel issue. In the past, most “scraping” cases in the Internet sphere brought under Article 2 of the AUCL focused on the (undue) appropriation of content “owned” or created by competitors – for example, video streaming available on a website (see our alert on a recent “ad block” case here). In this case, in contrast, the “scraped” content was not “owned” by the plaintiff Hantao, but was produced by users of dianping.com (i.e., everyday consumers). This position seems largely consistent with the Trial Guidelines on Network Related Intellectual Property Right Cases, issued by the Beijing High People’s Court in April 2016. According to these guidelines, the courts in Beijing may hold the unauthorized use of information from a website to be unfair competition under Article 2 of the AUCL if (1) the information can increase business opportunities and competitive advantages for the plaintiff; and (2) the use of the information provides users with an effective alternative to the website where the information is from. Similar to the court’s ruling in Hantao v. Baidu, the guidelines seem to apply irrespective of whether or not the information in question is “owned” by the plaintiff.

To rule on the “scraping” issue, the court in Hantao v. Baidu focused on the four-factor analysis described above. A key element in the court’s analysis was that Hantao had made significant efforts in the collection and use of the original information, even if the authors of the reviews were individual consumers. Although the court’s finding may have been fact- and case-specific (for example, the court considered the dianping.com reviews to reduce the “information asymmetry” vis-à-vis consumers), the judgment contains some upbeat language on the positive effects of producing, collecting and using consumer-related information by Internet players. This stands in contrast to some of the developments in Europe where the handling of consumer-related information is at times viewed skeptically – not only from a privacy, but also increasingly from an antitrust, perspective.

In China, the Pudong court found Hantao’s investment into building up the consumer review system on dianping.com as worthy of protection. Interestingly, the court also used language reminiscent of the provisions in the Anti-Monopoly Law, finding that Baidu “has strong technical capabilities and a leading market position... [and] achieved the purpose of excluding competitors by exploiting the results of other websites at extremely low cost.” But, for the most part, the court’s arguments were similar to judgments in past Chinese Internet cases under the AUCL, focusing on Baidu’s “free-riding” (other cases referred to the seemingly more general concept of “interference”). As with many of the past AUCL cases, one driver behind the court’s findings in Hantao v. Baidu may have been the recognition that Internet players often make significant upfront investments which they need to recoup at one point. Hence, courts at times provide some protection for past investments and existing business models under the Article 2 “case law.”

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MOFCOM lifts merger control conditions on 2012 Walmart acquisition

On 8 June 2016, the Chinese Ministry of Commerce (“MOFCOM”) released its decision to lift the conditions it had imposed on Walmart’s acquisition of 33.6% of the shares in Newheight Holdings. This acquisition in 2012 gave Walmart corresponding rights over Yihaodian, one of China’s best-known e-commerce supermarkets, through a reported “variable interest entity” (“VIE”) structure (see our alert here).

This decision is the logical outcome of two separate sets of developments.

MOFCOM’s 2012 remedy decision

MOFCOM’s 2012 decision seemed to rely on a complicated theory whereby, through the indirect acquisition of a majority shareholding in Yihaodian, Walmart would somehow leverage its position as a major bricks-and-mortar supermarket worldwide and increasingly in China into the online retail space, and from there into the area of certain value-added telecommunications services (“VATS”).

As a result, MOFCOM imposed a number of conditions to its merger control clearance:

- Newheight Shanghai (a Newheight Holdings subsidiary) is only entitled to use its online platform for its own sales (i.e., not for sales of third-party goods)
- Newheight Shanghai is prohibited from allowing its online platform to be used by other vendors without a VATS business permit, and
- Walmart shall not use a VIE structure to engage in VATS through Yihaodian.

Under MOFCOM’s Relevant Issues concerning the Examination, Approval and Administration of Foreign Investment Project in Internet and Vending Machine Sale, providing an online platform through which third parties can trade their goods would be deemed an activity requiring a VATS business permit (it was widely thought to be an “Internet content provider service” at the time) with a cap on foreign investment of 50%. Through the acquisition, Walmart would have indirectly acquired a majority in Yihaodian, thereby exceeding the cap.

New 2016 decision

In its decision from 30 May 2016 – made public on 8 June – MOFCOM decided to lift the conditions imposed in its 2012 decision. MOFCOM’s reasoning was as follows. First, MOFCOM found that Walmart had been in full compliance with the remedies imposed in the 2012 decision.

Second, MOFCOM surveyed the current competitive situation in the market. It held that new policies since 2014 have liberalized certain VATS markets, and that this would attract new entrants into the market. This refers to the decision by the telecoms and Internet regulator, the Ministry of Industry and Information Technology (“MIIT”), in June 2015 to open up operational e-commerce to foreign investment, such that it is now permitted for foreign investors to own 100% of an operational e-commerce entity (see our alert here).

Given that regulatory change, it would have seemed somewhat incongruous to have contrived to apply restrictions that effectively denied Walmart the benefit of the liberalization.

Third, MOFCOM found that Yihaodian’s market position had not grown as fast as the overall market.
MOFCOM’s decision to lift the remedies imposed in the Walmart/Newheight case did not come as a surprise. In the past few months, MOFCOM issued a number of decisions where it has lifted remedies from past conditional merger clearance decisions, or agreed to change them to the parties’ benefit.

Some of the decisions to lift or alter remedies were made public, for example the decisions on the remedies in Google/Motorola Mobility, Western Digital/Hitachi Storage and Seagate/Samsung Hard Disk. Other decisions do not appear to have been published as such, reportedly for example a remedy from the Mitsubishi Rayon/Lucite International transaction.

The importance of this set of decisions lifting or changing past remedies goes beyond the particular companies involved. It can also be interpreted as a learning process by MOFCOM – either as a recognition that the remedies were effective and indeed removed the concern the authority had when issuing conditional clearance or, perhaps more likely, as an indirect admission that some of the remedies were not particularly necessary or effective and – having allowed the “dust to settle” – it is now time to lift those conditions.

Back in 2012, the Walmart/Newheight remedies in particular seemed to have been driven by a last minute regulatory intervention based on policy/strategy considerations, beyond pure antitrust concerns. Looking at this from a positive perspective, the fact that MOFCOM lifted these conditions arguably shows that the authority is willing to have a fresh look at, and to make necessary adjustments to, previous decisions.
How oversight killed the criminalisation of cartels

The coming into effect of section 73A of the Competition Amendment Act from 1 May 2016 is likely to raise concern among many executives.

The provision makes criminal the conduct of directors and/or managers who cause the firm to become involved in any practice that involves price fixing, dividing markets between competitors and collusive tendering.

The provision targets for criminal liability not only the director or manager who actually “caused” the firm to become involved in one of the prohibited practices, but also those who simply “knowingly acquiesced” to the conduct.

This appears to be a rather low threshold considering that directors and/or managers may be criminally liable for a fine and imprisonment (imprisonment of up to 10 years and/or a R500,000 fine). It is evident that the purpose of section 73A is to provide a further deterrent to parties who engage in the abovementioned prohibited practices, over and above the penalties that are already in place.

Yet, the coming into effect of section 73A raises two questions: firstly, is section 73A constitutional and secondly, how effective will it be? If the answer is no to at least one, then the only effect it will have on competition law is likely to be a negative one.

There is nothing inherently unconstitutional about criminalising cartels – various other jurisdictions, such as the United States of America, Australia, Canada and the United Kingdom, have criminalised competition offences. The question is more specifically whether section 73A itself is unconstitutional.

When section 73A was passed by parliament in 2009, there were numerous constitutional objections to its subsections (5) and (6). The constitutional objection to subsection (5) was that it imposed a “reverse onus” on directors and/or managers and thus infringed their right to be presumed innocent. The constitutional objections to subsection (6) were: it violates the director’s rights to a fair trial – especially the right to choose legal practitioners; and it violates the right to freedom and security by prohibiting the company from paying the fines and legal fees.

These constitutional objections in conjunction with the potentially chilling effect it may have on the South African Competition Commission’s Corporate Leniency Policy (CLP) appeared to be the key reasons why the promulgation of the provision was delayed since 2009 (seven-and-a-half years).

Interestingly, the proclamation in the Government Gazette specifically excluded subsections (5) and (6) from coming into effect, thus removing the most likely constitutional challenges. The fate of these subsections remains to be seen, but one would think it is unlikely they will be brought into effect.

As we have considered the constitutionality of section 73A, the next question is how effective it will be.

Theoretically, the new legislation should be a greater deterrent to cartel conduct; however, this will only be the case if there is a well-functioning CLP in place. This is because leniency is the most successful tool for detecting, deterring and prosecuting cartel activity in South Africa, and the world. Accordingly, the effect section 73A will have on the CLP is highly significant.

The hallmark of cartels is that they are secretive, deceptive and conducted through a conspiracy among a number of firms. As a result, detecting a cartel is a daunting task for competition authorities without co-operation from a member within the cartel itself. Consequently, the CLP sets out to do exactly that: gain co-operation from a cartel member.
Its strategy is simple: if a firm is found guilty of participating in a cartel they may be liable for an administrative penalty of up to 10% of the firm’s annual turnover. Thus, the CLP provides immunity to the first cartel member who confesses that they are a member of a cartel and hence disseminates distrust among all members of the cartel.

This dissemination of distrust in conjunction with granting immunity from the penalty has made the CLP the most effective tool for detecting and prosecuting cartels. Nevertheless, it must be emphasised that a company is only likely to apply for the CLP where the associated uncertainty is minimal.

The problem is that section 73A poses a risk of eroding the effectiveness of the CLP due to the uncertainty it creates. Although the Competition Commission may grant immunity to a cartel member, the NPA has the final discretion to grant criminal immunity to directors and/or managers. The Competition Commission can only recommend that a cartel member is “deserving of immunity”.

As there is uncertainty whether the NPA will grant immunity to directors, the provision will inevitably deter firms from using the CLP to blow the whistle on their fellow cartel members. It is not difficult to imagine that the uncertainty around the risk of incarceration for directors and/or managers will dramatically decrease the effectiveness of the CLP, as it is the directors who make the decision to apply for leniency.

The effect of uncertainty is not new to the CLP and it was one of its major weaknesses before it was comprehensively amended in 2008. The wording of the original CLP was rather ambiguous with the result that it created a great deal of uncertainty.

Moreover, a number of commentators view that the major drawback of the original CLP was that the Competition Commission had wide discretionary powers to decide whether immunity should be granted and further; the Commission would not grant immunity if the applicant was deemed to be the “ringleader” of the cartel.

If uncertainty was one of the reasons for its initial failure, it is rather worrying, as it appears that section 73A has once again resurrected uncertainty around the CLP.

As it stands, criminalising cartels as per section 73A appears to have circumvented the most likely constitutional challenges but appears to have produced uncertainty around how the CLP will operate. This will inevitably discourage cartel member from using the CLP and, to the contrary, will encourage them to be more secretive and deceptive.

For that reason, section 73A will not have its desired effect – if cartels cannot be detected, they cannot be held criminally liable.

It remains to be seen how the Competition Commission will handle this anomaly. They will at least need to establish a Memorandum of Understanding between the Competition Commission and the NPA, setting out in detail how immunity will be handled between them.

This appears to be the route taken in other jurisdictions such as the United Kingdom. However, it must be said that there have only been three successful criminal prosecutions in the United Kingdom in the last 13 years.

What is certain at this point is the need for the Competition Commission and the NPA to create a secure and predictable environment in order to have any chance of ensuring that cartel members apply for leniency in terms of the CLP.
Big data is no longer a term used only by the digital economy. Competition law agencies in Germany and France significantly ramp-up their enforcement tools in the light of technology-driven market changes. As regulators aim at being on par with market players dealing with big data, such companies need to carefully analyze whether the approach taken in the EU can affect any planned transactions or whether their business model contains any risks of being reviewed by the agencies.

The German Bundeskartellamt (Federal Cartel Office or FCO) and the French Autorité de la concurrence (French Competition Authority) on 10 May 2016 published a joint report on Competition Law and Data (Report). The same day, the French Competition Authority announced the launch of a “full-blown sector inquiry into data-related markets and strategies” towards the end of this month. This follows an investigation by the FCO launched two months ago into whether a potential breach of data protection rules can constitute an abuse of dominance.

In the Report, the French and German competition enforcers analyze the implications and challenges for competition authorities resulting from data collection in the digital economy and other industries and companies seeking to protect their already built-up “data advantage”. The Report aims at providing an overview on the relevant issues and to discuss various interfaces between big data and established concepts of competition law enforcement.

As set out in the Report, the emergence of companies generating high turnovers with business models which involve the collection, processing and commercial use of (often personal) data gives rise to discussions. Competition law can be specifically relevant with regards to the assessment of data as a factor to establish market power. Thus, the new competition law focus on big data goes far beyond potential adjustments to established merger control regimes. The Report also puts various potential “data-based” conducts in the competition authorities’ spotlights and discusses them on the basis of the established theories of harm.
In particular, the Report identifies two main aspects when assessing the relevance of data for competition law enforcement, specifically when looking at data’s contribution to market power:

– Can the data under consideration be easily obtained by competitors, i.e. is there scarcity of data or can it be easily replicated?

– Does the scale and scope of the relevant data matter for the assessment of market power?

Against this background, the Report acknowledges that while “data is everywhere”, the actual extent of substitutability between different types of data has been considered in several past cases. It calls for a case-by-case assessment of competition law risks resulting of companies with a significant “data advantage”. The lack of a safe harbor and predictability of such an individual assessment requires companies to self-assess whether their business model is in line with the French-German approach.

France and Germany coordinated closely with the European Commission when working on the Report in an attempt to avoid a regulatory patchwork rug. However, the fact that national authorities deal with these questions at the same time when the EU Commission is actively pursuing its Digital Single Market Strategy (DSM Strategy) is a challenge for companies as they need to keep up with the pace of several regulators in Europe.
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