

Hogan  
Lovells



# Antitrust, Competition and Economic Regulation Quarterly Newsletter

Winter 2018



# Contents

---

Digital antitrust – outlook for the European antitrust year 2018	4
Mexican court renders a landmark decision and recognises the protection of attorney-client privilege in antitrust investigations	7
UK public interest reforms – greater scrutiny of transactions affecting national security	9
China eliminates antitrust overlaps in Anti-Unfair Competition Law	12
A preview of the FTC’s role in monitoring broadband markets following the FCC’s adoption of the Restoring Internet Freedom Order	14
Shared economy and digital single market – Airbnb and the virtuous advocacy exercise of the Italian Competition Authority	19
Update from Africa – recent competition law developments	21
Hong Kong court rejects self-incrimination defense in antitrust investigation	24
Big data and competition: German FCO continues to lead the way	27

# Digital antitrust – outlook for the European antitrust year 2018

We present below a short outlook of what to expect from European antitrust enforcement in 2018, with a particular focus on Germany. One theme that is likely to feature even more than last year is the impact of antitrust law on digital markets. Antitrust law has become a force for disruption in the world of tech. Multi-billion fines for online platforms which are considered not to be sufficiently neutral. Dawn raids for denied access to data. Transactions blocked or unwound if a unicorn is acquired by the wrong player.

The issuing of the French-German Joint Paper on “*Competition Law and Data*” in May 2016 was a manifestation of a growing uneasiness amongst European enforcers about the position and apparent influence of certain participants in the European digital economy. Critics countered by labelling such concerns (and proposed interventions) as “*hipster antitrust*” – a derisive term coined by its (notably American) detractors regarding debatable theories of harm advanced by enforcers (and academics) in attempts to explain and deal with, for example, high concentration levels (primarily, though not exclusively, in digital markets). Undeterred by such criticism, European competition authorities have nevertheless ramped-up their enforcement focus in light of their competition and consumer protection concerns regarding the operation of European digital markets.

In 2017, we have seen discussions about the need for a digital antitrust enforcer as proposed by the German Federal Ministry for Economic Affairs in its White Paper “*Digital Platform*”. Germany has continued to take a pioneer role with the 9th amendment of the German Act Against Restraints of Competition adapting its competition law to the digital age and introducing a new Size-of-Transaction test to German merger control. Finally, the German Federal Cartel Office (“FCO”) has published a thought leadership paper on “*Big Data and Competition*”.

Further, in December 2017 the FCO has launched a sector inquiry into smart TVs manufacturers<sup>2</sup> to take a close look at how “*smart TVs*” handle user data. In this context, Andreas Mundt, the president of the FCO, stated that “*the fate of consumer data once released*

*and their commercial use will certainly keep us busy beyond the current sector inquiry.*” Also in its 2017 Review<sup>3</sup> the FCO reiterated that “*the digital economy is becoming increasingly important*” to its work.

On the European level, we have heard Johannes Laitenberger, Director-General for Competition, repeatedly talking about the need for fair competition, especially in digital and innovations markets. For 2018, the EU Commission has announced a study collecting data on the market power of Internet giants with a specific focus on potential market concentration and the impact of digital technologies. In this context, Tommaso Valletti, the EU Commission’s chief competition economist, has recently talked about the EU Commission bringing its own contribution to the “*hipster antitrust*” debate.

So far, the focus of antitrust enforcement in the digital world has been on questions regarding “*big data*” and large, consumer-facing platforms. For 2018, we expect the debate to expand into other tech areas including Artificial Intelligence (“AI”), algorithms and blockchain. Andreas Mundt has just recently stated that companies cannot hide behind an algorithm when it comes to potential antitrust violations. We also expect that the more blockchain technology evolves and penetrates into almost all industries, the more it will attract the competition law and regulatory authorities’ attention.

Lying ahead in 2018 is the finalisation of the FCO’s pending probe into data-related business models and the EU Commission’s study<sup>4</sup> to raise awareness about algorithms, indicating that 2018 is set to continue this pattern of aggressive enforcement.

1 Bundeskartellamt, press release: “The French Autorité de la concurrence and the German Bundeskartellamt publish joint paper on data and its implications for Competition Law”, 10 May 2016, available at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10\\_05\\_2016\\_Big%20Data%20Papier.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html) [accessed 16 January 2018].

2 Bundeskartellamt, press release: “Bundeskartellamt launches sector inquiry into smart TVs”, 13 December 2017, available at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/13\\_12\\_2017\\_SU\\_SmartTV.html?nn=3591286](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/13_12_2017_SU_SmartTV.html?nn=3591286) [accessed 16 January 2018].

3 Bundeskartellamt, press release: “Bundeskartellamt – Review of 2017”, 21 December 2017, available at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/21\\_12\\_2017\\_Jahresueckblick.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/21_12_2017_Jahresueckblick.html?nn=3591568) [accessed 16 January 2018].

4 European Commission, policy web page: “Call for tender: Study to raise awareness about algorithms”, 17 July 2017, available at <https://ec.europa.eu/digital-single-market/en/news/call-tender-study-raise-awareness-about-algorithms> [accessed 16 January 2018].

The challenge for companies in this field is to deal with different priorities of antitrust authorities: while the antitrust approach of the U.S. administration seems less clear than ever, Europe takes the lead with investigations into tech platforms that often have a U.S. background. A recipe for continued global disruption. More than ever, the tech sector needs to plan its competition law strategy for the road ahead.



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



**Christian Ritz**  
Senior Associate, Munich  
T +49 89 29012 128  
christian.ritz@hoganlovells.com





# Mexican court renders a landmark decision and recognises the protection of attorney-client privilege in antitrust investigations

## 1. Attorney-client privilege in Mexico

Unlike other jurisdictions, the Mexican legal framework does not expressly recognise the protection of attorney-client privilege, except in criminal matters. This omission has caused uncertainty to antitrust practitioners, their clients, and even the Mexican authority regarding the scope of its investigative powers, particularly when performing dawn raids.

In an attempt to reduce such uncertainty, last year the Mexican Competition Commission submitted for public consultation a draft amendment to the Regulations of the Mexican antitrust statute that recognised in one of its newly-created provisions the protection of attorney-client privilege in antitrust investigations. The relevant provision was subject to specific remarks by the three existing Mexican Bar Associations since it departed from the existing constitutional framework. Hogan Lovells, through Omar Guerrero and Alan Ramírez, advised the Mexican Bar Association on this matter.

## 2. The straw that broke the camel's back

In 2015, the Mexican antitrust investigating authority launched an investigation into possible cartel behaviour by egg producers in Mexico, raiding: (i) a trade association and also (ii) the largest player in the egg market. These were the very first unannounced dawn raids performed by the investigating authority of the Mexican Economic Competition Commission premiering the investigative powers granted by the New Mexican Competition Law (in force as of 7 July 2014).

During both dawn raids, the Competition Commission extracted attorney-client confidential and privileged communications and antitrust audit reports performed by the entities' respective external counsel.

## 3. The long journey to justice

Clients were prevented from challenging the competition investigating authority's dawn raids due to existing court precedents that restrict such challenges at the investigation stage of proceedings. Formerly, one of the two federal specialised competition courts had interpreted Article 28 of the Mexican Constitution as only allowing the final decision of proceedings to be challenged but not intermediary activities, such as dawn raids. Both law firms involved with the egg producer dawn raids – while not themselves being parties of the investigation – challenged before the

Specialised Competition Judges the extraction of their attorney-client communications and work-product during the dawn raids performed to their clients by the antitrust authority. Their main argument was that such privileged communications and work-product were protected and, therefore, that the investigating authority, or subsequently the Commission as decision-making body, could not have legal access to their content.

Initially, the Specialised Competition Judges dismissed both law firm challenges by considering that external legal counsel – as well as their clients – must wait until the end of antitrust proceedings in order to challenge the investigation activities of the competition authority. The parties appealed those decisions to the Specialised Competition Courts of Appeal. The resulting decisions followed different paths since they were decided by two different courts: (i) the Second Specialised Competition Court of Appeal confirmed in a two-to-one decision the Judge's finding that the parties must await a final decision before challenging intermediary activities, in particular to verify whether or not the final decision was adverse to their interests; meanwhile, (ii) the First Specialised Competition Court of Appeal unanimously reversed the Judge's dismissal and ordered the admission of the law firm challenge. The main reasoning behind this was that, as external counsel were not party to the antitrust investigation, they were not subject to the same restrictions as those imposed on the parties to the antitrust proceedings.

In June 2017, the Plenary of Specialised Competition Courts (the six Magistrates that comprise both federal specialised appeal courts) decided and recognised that lawyers can immediately challenge the extraction of confidential communications and legal work-product during dawn raids conducted on their clients' premises by the competition authorities. This was a major step towards the protection of attorney-client privileged and confidential information.

## 4. Meaning and scope of attorney-client privilege in Mexico

On 21 December 2017, after several years of litigation, the First Specialised Competition Court of Appeal finally decided the merits of this landmark case (Docket: R.A. 88/2017) and handed lawyers a victory on the recognition and protection of attorney-

client privilege in antitrust matters. Hogan Lovells participated actively as *amicus curiae* before the First Specialised Competition Court of Appeal.

The judgment was recently published and describes the scope of the protection granted over attorney-client privilege by the court in the following way:

- a) even though attorney-client privilege has no precise expression under Mexican Competition Law, it is guaranteed by the Mexican Constitution through the protection of the fundamental rights to: a) privacy, b) present a defense, c) secrecy of correspondence, and d) practice a profession;
- b) antitrust audit reports performed by external counsel to their clients relating to the investigated conducts and extracted during the relevant dawn raid by the competition authority are protected by such privilege, as long as the communication complies the following conditions:
  - i. the exchange of information must arise between external counsel and their client (a lawyer who is not bound by an employment relationship with the client);
  - ii. the exchange of information must be related to the client's right to a proper defense;
- c) if the enforcer comes across information that is protected by the abovementioned privilege, it should adopt the necessary measures to preserve the secrecy of the relevant documents and exclude them from its investigation;
- d) should the enforcer violate paragraph (c) above, the antitrust investigating authority must destroy copies of privileged reports obtained during the dawn raid;
- e) the investigating authority of the Competition Commission cannot access or, in any way, use the information contained in such reports. All the acts derived from such information will be null and void.

This was one of the most awaited judgments in Mexico, and even though it is not a binding precedent for the other Specialised Competition Courts, this landmark decision represents a very significant leap forward for competition law in Mexico, and more generally, for the exercise of our professional practice.



**Luis Omar Guerrero**  
Partner, Mexico City  
T +52 55 5091 0162  
omar.guerrero@hoganlovells.com



**Ricardo Pons**  
Partner, Mexico City  
T +52 55 5091 0166  
ricardo.pons@hoganlovells.com



**Alan Ramírez**  
Senior Associate, Mexico City  
T +52 55 5091 0066  
alan.ramirez@hoganlovells.com



**Cecilia Serrano**  
Legal Intern, Mexico City  
T +52 55 50910170  
cecilia.serrano@hoganlovells.com



# UK public interest reforms – greater scrutiny of transactions affecting national security

In October 2017, the UK Government published a Green Paper (*“National Security and Infrastructure Investment Review”*) containing proposals that, if implemented, would significantly expand its ability to review, and potentially veto, foreign investments and transactions that raise national security concerns. The proposals reflect a wider global trend towards increasing government intervention in relation to foreign investments, including the European Commission’s recent proposals to enable the EU Member States and the European Commission to screen foreign direct investment on the grounds of security or public order.

Although the proposed reforms will, if implemented, permit greater scrutiny of foreign direct investment in certain sectors, the UK Government is at pains to emphasise the *“United Kingdom economy is open to the world”*. In launching the Green Paper the Business and Energy Secretary Greg Clark stated that the UK *“has and always has had a proud record of being open to the world as the foremost advocate of free trade. [...] No part of the economy is off-limits to foreign investment and the UK will continue to be a vociferous advocate for free trade and a magnet for global talent.”*

## Current rules

Since the introduction of the Enterprise Act 2002, the UK Government has retained the power to intervene in transactions only where a transaction raises specified public interest concerns, and meets merger control thresholds of either the UK or the EU (in the latter case, Article 21(4) of the EUMR permits Member States to *“protect legitimate interests”* even where the EU thresholds are met). The public interest grounds that can justify intervention are national security, financial stability and media plurality. There are also a limited number of circumstances in which the UK Government can intervene where one of the parties is a relevant government contractor even if the UK or EU thresholds are not met.

The UK Government now considers that the existing powers need to be reformed to keep the UK regime *“up-to-date”*. The new proposals, which were headlined in the Queen’s Speech in 2017, include proposed changes to be introduced in the short-term to notification thresholds in certain key sectors, and some longer-term proposals designed to give the UK Government greater powers to review transactions on national security grounds. Taken together, the proposals will considerably expand the ability of the UK Government to scrutinise foreign investments in key sectors.

## Short-term proposals – lower thresholds for certain sectors

The UK Government’s position is that the current merger control thresholds require *“urgent updating”* in relation to certain sectors.

Under the current regime, across all sectors the CMA has jurisdiction to review a transaction where the target’s UK turnover exceeds £70 million and/or the transaction creates or enhances a share of supply or purchase of at least 25% of any goods or services in the UK (or in a substantial part of it). Except in the case of transactions involving a government contractor, these thresholds must also be met before the UK Government can intervene and initiate a public interest review.

The short-term proposals involve lowering the CMA’s jurisdictional thresholds to capture smaller businesses active in the military and dual-use sectors, and the advanced technology sector. In those sectors, the UK Government now proposes to reduce the turnover threshold from £70 million to £1 million and, although the share of supply test will remain, it will no longer be necessary for there to be an increase in the share of supply in order for the test to be met.

The direct consequence of this is that, in the relevant sectors, the threshold at which the UK Government can intervene will be significantly lowered.

A key issue for parties will be whether a transaction relates to one of the relevant sectors. The Green Paper provides some clarity:

1. The military and dual-use sectors encompass the design and production of military items (such as arms, military and paramilitary equipment) and dual-use items which could have military and civilian uses. The UK Government proposes to define these businesses by reference to the existing Strategic Export Control Lists, in particular to include enterprises that design or manufacture items or hold related software or technology specified

on the UK Military List, UK Dual-Use List, UK Radioactive Source List and EU Dual-Use Lists. Given the established nature of these lists, the UK Government considers that using this definition will provide clarity, and ensure that businesses are aware of whether or not they fall within the scope of the proposals.

2. Parts of the advanced technology sector are included in an attempt to future-proof the rules to catch new and disruptive technologies. More specifically, it is proposed that this category will cover:
  - (a) “*multi-purpose computing hardware*”, which includes enterprises that: (i) own or create intellectual property rights in the functional capability of multi-purpose computing hardware; or (ii) design, maintain or support the secure provisioning or management of roots of trust of multi-purpose computing hardware; and
  - (b) “*quantum-based technology*”, which includes enterprises that research, develop, design or manufacture goods for use in, or supply services based on, quantum computing or quantum communications technologies. This would include the creation of relevant intellectual property or components.

Although it will be possible for the UK Government to intervene and initiate a national security review in relation to transactions in the relevant sectors meeting the lower thresholds, and for the CMA to conduct a competition review, such reviews will not be automatic.

As the UK Government has expressed a need to “*press ahead... immediately after consultation*” to introduce the necessary secondary legislation, changes should be expected very soon.

### **Long-term proposals – expanded version of the “call-in” power and/or a mandatory notification regime**

The UK Government has also put forward long-term proposals to allow for greater scrutiny of mergers that may raise national security concerns, including the increased risks of espionage, sabotage or the ability to exert inappropriate leverage.

The UK currently operates a voluntary merger review regime, where merger parties have the choice of

whether or not to notify a transaction which meets the CMA’s jurisdictional thresholds. However, this is subject to the CMA’s power to “*call-in*” un-notified transactions, and to refer such transactions for an in-depth Phase 2 review within four months of completion becoming public.

The proposals under consultation not only include an expansion of this call-in power as part of a voluntary regime, but also include the proposed introduction of a mandatory notification regime for certain areas of the economy. The UK Government has put forward a number of proposals which would require primary legislation, and which could include a combination or all of the following:

- The introduction of an expanded call-in power within the existing voluntary regime to enable the Secretary of State to review for national security concerns a broader range of acquisitions, including bare asset sales and “*new projects*” (i.e., new developments or other business activities which are not yet functioning enterprises). The call-in power would be available for a period of three months, and apply to an acquisition of more than 25% of a company’s shares or votes (which is in line with the CMA’s current approach) and to any other transaction that gives (directly or indirectly) significant influence or control over that company or over its assets or businesses in the UK. This is acknowledged to be much broader than the scope of the current merger control rules.
- The introduction of a mandatory notification regime for foreign investment into a “*focused set of essential functions in key parts of the economy*”. These would include, as a minimum, the civil nuclear, defence, energy, telecommunications and transport sectors, and will likely also include the manufacture of military and dual use items, advanced technology, government and emergency services sectors. The Green Paper acknowledges that a mandatory notification regime for these transactions would mean that all foreign investors in the specified sectors would need to secure approval before the transaction could take legal effect, but the UK Government has stated that it expects that it would give rapid approval for the majority of transactions.

- The UK Government is also considering whether to include in the scope of the mandatory review system particular plots of land in the UK which are close to national security-sensitive sites.

Under each of the proposals, the UK Government will have the same enforcement powers currently available to the Secretary of State under the current public interest intervention regime (i.e., the power to approve transactions, impose conditions, or block or unwind transactions) subject to judicial review.

### Next steps

As highlighted above, steps to implement the short-term proposals should be expected soon. The timing of the long-term proposals is not clear, but further clarity can be expected in the coming months.



**Christopher Hutton**

Partner, London

T +44 20 7296 2402

[christopher.hutton@hoganlovells.com](mailto:christopher.hutton@hoganlovells.com)



**Aniko Adam**

Senior Associate, London

T +44 20 7296 5363

[aniko.adam@hoganlovells.com](mailto:aniko.adam@hoganlovells.com)



# China eliminates antitrust overlaps in Anti-Unfair Competition Law

On 4 November 2017, the Standing Committee of the National People's Congress passed some amendments to China's Anti-Unfair Competition Law ("AUCL"). The amendments took effect from 1 January 2018.

This is the first time that the AUCL has been revised since its entry into force in 1993. As part of the amendments, the AUCL's antitrust provisions were deleted.

## Antitrust overlaps undone

The AUCL is a complex statute with rules pertaining to various legal fields, including antitrust, intellectual property and commercial bribery.

In the antitrust field, the AUCL prohibited certain types of conduct:

- predatory pricing, tying, and the imposition of unreasonable conditions on trading partners;
- exclusive dealing and similar conduct by public utilities;
- certain types of anti-competitive government conduct; and
- bid-rigging.

Over the past years, these provisions added significant complexity to Chinese antitrust assessments, since the above-mentioned types of conduct are also subject to prohibitions in the Anti-Monopoly Law ("AML"), China's main competition law in force since 2008. For example, predatory pricing and tying are outlawed by the AML if the company involved has a dominant position, while the AUCL did not require a showing of dominance.

With the amendment, the relevant AML provisions have now been deleted and the AML has become the sole standard for assessing the legality of these types of conduct.

## Relative dominance clause not enacted

During the process of revising the AUCL, several drafts were circulated, including in the public domain. One early draft proposed to include a brand-new prohibition on companies in a "*relatively advantageous position*" from engaging in certain conduct deemed abusive, such as exclusive dealing or charging excessive fees. This new clause seemed to have been inspired by the "*relative dominance*" / "*superior bargaining power*"-type of provisions in German, Japanese and Korean competition laws.

However, in response to the invitation for comments on the draft AUCL amendments, many stakeholders in China spoke out very critically against the new draft clause. In the end, the clause did not make it into the AUCL amendment.

## New Internet unfair competition clause

While abuses of relative dominance did not make it into the final AUCL amendment, another new clause did: the Internet unfair competition clause.

Article 12 of the amended AUCL prohibits certain types of conduct by Internet players which are deemed to constitute "*unfair competition*". The key idea behind the conduct listed is that an Internet company is prohibited from obstructing legitimate activities of competitors. By way of example, an ad block company may not be allowed to interfere technically in the broadcast of another company's online videos, skipping the ads before or during the videos.

That said, to a large extent, Article 12 only codifies existing case practice by courts throughout China, and hence is not a novelty as such.

## Conclusions

The AUCL amendment has an overall positive impact on Chinese antitrust law and practice. With the elimination of the overlaps between the AUCL and the AML, the benchmarks for antitrust compliance assessment will be more coherent and easier to follow. The fact that the "*relative dominance*" clause was not enacted avoids a (perhaps excessive) compliance burden on companies.

With the successful amendment of the AUCL, the focus of the Chinese antitrust community is now shifting back to the enforcement of the AML – and the legislative process of amending the AML itself, a process which was launched a few months ago.



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



# A preview of the FTC's role in monitoring broadband markets following the FCC's adoption of the Restoring Internet Freedom Order

Amid the on-going discussion surrounding “*net neutrality*”, the FTC's role in overseeing Broadband Internet Access Service (“BIAS”) has received increasing scrutiny following the recent passage of the FCC's Restoring Internet Freedom Order (“RIF Order”). Several recent developments indicate that, although the Federal Communications Commission (“FCC”) will continue to have a shared role in monitoring broadband markets, the Federal Trade Commission (“FTC”) will take the lead in investigating and bringing enforcement actions against Internet Service Providers (“ISPs”) for practices that raise anticompetitive concerns. Therefore, commercial stakeholders should pay careful attention to the potential for antitrust enforcement in broadband markets moving forward.

## Background

In 2015, the FCC issued the Open Internet Order, which re-categorised BIAS providers as “*common carriers*” under Title II of the Communications Act. This development is relevant from an antitrust perspective because common carriers are exempt from the FTC's purview under Section 5(a)(2) of the FTC Act. As a result, the Open Internet Order provided the FCC with singular authority to regulate ISPs' practices related to last mile delivery and network management. In addition, the Open Internet Order instituted a series of pre-emptive conduct rules that explicitly prohibited ISPs from engaging in general categories of practices known as blocking, throttling, and paid prioritisation, the latter of which describes a situation in which an ISP directly or indirectly favours certain online traffic in exchange for payment.

Following the change in presidential administrations, the FCC's newly appointed Chairman, Ajit Pai, indicated that the FCC would seek to reclassify BIAS as an “*information service*” under Title I of the Communications Act, rather than as a “*common carrier*” service.

## Discussion of the FTC's enforcement authority in the Restoring Internet Freedom Order

In support of the FCC's decision to reclassify BIAS as an “*information service*” and repeal the Open Internet Order's conduct rules, the RIF Order reinstated a modified version of the “*Transparency Rule*” adopted by the FCC in 2010.<sup>1</sup> The Transparency Rule specified that BIAS providers must “*publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband Internet*

*access services*”.<sup>2</sup> The RIF Order noted that these disclosure requirements will enable the FCC and FTC “*to observe the communications marketplace*” while also providing “*valuable information to other Internet ecosystem participants*”.<sup>3</sup> The RIF Order then goes on to explain that the Transparency Rule would allow the FTC to serve as an effective “*backstop*” given the FTC's “*broad authority*” to enforce antitrust and consumer protection law.<sup>4</sup> The RIF Order thereby created a regulatory framework for BIAS that relies on a combination of mandatory disclosures and case-by-case antitrust enforcement.

While the RIF Order eliminated the 2015 conduct rules, it approvingly cited comments submitted by FTC staff that explained that the agency need not demonstrate an ISP has “*monopoly power*” in a relevant market in order to challenge an ISP's network management practices.<sup>5</sup> The RIF Order then explains that the FTC could continue to challenge practices that may be categorised as improper blocking and throttling, as well as certain forms of paid prioritisation.<sup>6</sup> With respect to blocking and throttling, the RIF Order noted that many of the largest ISPs have committed not to block or throttle legal content in a manner that is inconsistent with their network management practices, which are required to be disclosed under the Transparency Rule.<sup>7</sup> The RIF Order indicated that “[*t*]hese commitments can be enforced by the FTC under Section 5 [of the FTC Act]”.<sup>8</sup> Regarding paid prioritisation, the RIF Order stated that, in a variety of contexts, such arrangements can actually promote

<sup>2</sup> *Ibid* at paragraph 141.

<sup>3</sup> *Ibid* at paragraph 209.

<sup>4</sup> *Ibid* at paragraph 141.

<sup>5</sup> *Ibid* at paragraph 144, fn. 523 (“We note that FTC enforcement of Section 5 [of the FTC Act] is broader [than Section 2 of the Sherman Act] and would apply in the absence of monopoly power”).

<sup>6</sup> *Ibid* at paragraphs 141 to 142.

<sup>7</sup> *Ibid* at paragraph 142.

<sup>8</sup> *Ibid*.

<sup>1</sup> Declaratory Ruling Report and Order, In the Matter of Restoring Internet Freedom (“RIF Order”) WC Docket No. 17-108, paragraph 26, 4 January 2018, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-166A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf) [accessed 19 January 2018].

economic efficiency and innovation by enabling ISPs to better price services associated with content delivery and network management.<sup>9</sup> However, the RIF Order also acknowledged that, under certain limited circumstances, specific forms of paid prioritisation, such as an arrangement that favours affiliated content in a way that forecloses customers' access to non-affiliated content, could produce consumer harm and negatively impact competition in a relevant broadband market.<sup>10</sup> For these reasons, the RIF Order takes the view that *"it is difficult to determine on an ex ante basis [that] paid prioritisation agreements are anticompetitive"* and concludes that *"antitrust law, in combination with the [T]ransparency [R]ule... is particularly well-suited to addressing any potential or actual anticompetitive harms that may arise from paid prioritisation arrangements."*<sup>11</sup>

### The allocation of enforcement responsibilities under the FTC-FCC Memorandum of Understanding

On 14 December 2017, the FTC and FCC officially signed and adopted a Memorandum of Understanding ("MOU") that took effect upon the passage of the RIF Order that same day.<sup>12</sup> The MOU outlines how the two agencies intend to coordinate their online consumer protection efforts, including oversight and enforcement efforts related to ISPs, and cooperate with each other in monitoring broadband markets.<sup>13</sup>

The MOU generally divides the FCC's and FTC's jurisdiction over BIAS as follows:

- **FCC Role in Ensuring ISPs Comply with the Transparency Rule.** The MOU directs the FCC to review, among other things, informal protests submitted by consumers and, where appropriate, take enforcement actions against ISPs that fail to comply with their disclosure obligations or make their disclosures publicly available. The MOU also states that the FCC will monitor broadband markets in order to identify entry barriers.

<sup>9</sup> *Ibid* at paragraphs 253 to 262.

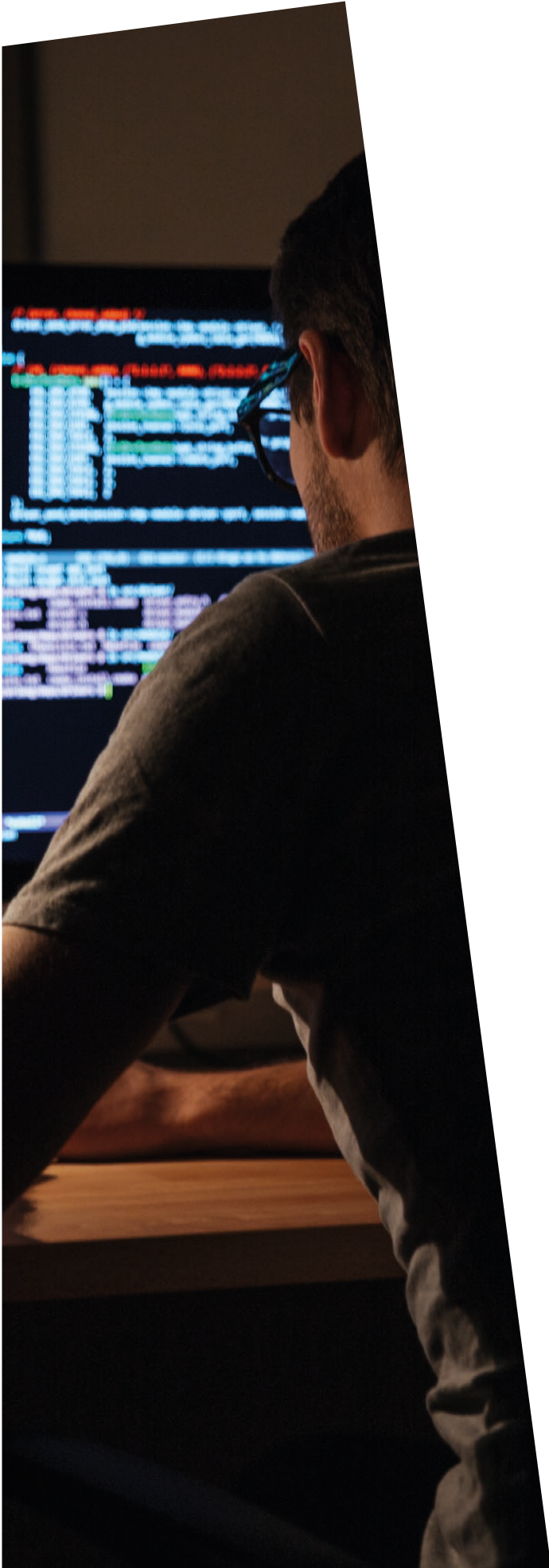
<sup>10</sup> *Ibid* at paragraph 261.

<sup>11</sup> *Ibid*.

<sup>12</sup> "FCC/FTC Sign MOU to Coordinate Online Consumer Protection Efforts", 14 December 2017, available at <https://www.fcc.gov/document/fccftc-sign-mou-coordinate-online-consumer-protection-efforts> [accessed 19 January 2018].

<sup>13</sup> Decision, "Restoring Internet Freedom FCC-FTC Memorandum of Understanding" ("MOU"), 14 December 2017, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-348275A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-348275A1.pdf) [accessed 19 January 2018].





- **FTC Role in Challenging ISPs for Unfair and Deceptive Practices and Inaccurate Disclosures.** The MOU states that the FTC will review and challenge ISPs for unfair and deceptive practices, including anticompetitive practices related to the provision of BIAS. This authority extends to investigating the accuracy of ISPs’ disclosures while also enabling the FTC to bring enforcement actions against ISPs for specific practices related to their marketing, advertising, and promotional activities that may be found to violate antitrust or consumer protection law.
- **Calls for more exchanges of information and inter-agency cooperation.** The RIF Order specifies that the agencies will securely share stakeholder complaints relating to BIAS. Information exchanges between the agencies are therefore subject to policies that require the agencies to protect confidential, personally-identifiable, and non-public information that complainants submit. The RIF Order also calls on the agencies to discuss potential investigations against ISPs that could arise under either agency’s jurisdiction, share best practices, and collaborate on consumer and industry outreach efforts.

### Questions surrounding the FTC’s enforcement authority

The question of whether the FTC will have the authority to bring enforcement actions as envisioned by the RIF Order and the MOU remains open. In particular, on 26 August 2016, the Ninth Circuit dismissed an FTC case against AT&T Mobility for certain throttling practices taken in connection with wireless data services provided to AT&T customers with limited data plans. While the FTC argued that Section 5(a)(2) is “*activity-based*” and extends only to those activities that are themselves classified as “*common carrier*” services, the Ninth Circuit ruled that this exemption is “*status-based*” and extends to any and all activities engaged in by an entity that is classified as a “*common carrier*”, irrespective of whether the entity’s activities actually being challenged by the FTC under Section 5 are themselves classified as “*common carrier*” services.<sup>14</sup>

<sup>14</sup> See *FTC v. AT&T Mobility LLC*, 835 F.3d 993 (9th Cir. 2016), reh’g en banc granted, No. 15-16585, 2017 WL 1856836 (9th Cir. 9 May 2017).



The FTC subsequently filed for appeal and the Ninth Circuit granted rehearing *en banc*, effectively setting aside the panel decision pending review. While this case was pending at the time the Restoring Internet Freedom Order was passed, the FCC cited the FTC's experience in bringing enforcement actions against ISPs (which dates back to 2000), explained that the FCC was not bound by the Ninth Circuit's holding, and declined to wait for the pending litigation to be resolved in proceeding with the RIF Order.<sup>15</sup>

Because an ISP (such as AT&T) may be classified as a "common carrier" with respect to their non-BIAS activities, strict application of the "status-based" test would appear to exempt an ISP's activities related to BIAS from the FTC's purview so long as the ISP remains classified as a "common carrier" with respect to their non-BIAS activities. Therefore, resolution of the FTC's case against AT&T Mobility is likely to have a material effect on the FCC's and FTC's ability to carry out the terms of the MOU.

### Conclusion

The RIF Order and MOU mark an important policy shift in the regulation of broadband markets. Important questions remain with respect to the specific practices the FTC might seek to address in consumer protection or antitrust cases brought under Section 5 as well as the scope of the FTC's legal authority in light of on-going challenges to its jurisdiction over BIAS. Nevertheless, the terms of the MOU signal that the FTC is positioned to become the primary agency responsible for reviewing ISP conduct and would have broad discretion to challenge ISP practices related to the provision of BIAS that can result in consumer harm.



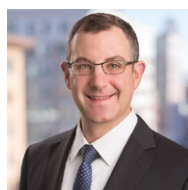
**Logan Breed**

Partner, Washington, D.C.  
T +1 202 637 6407  
logan.breed@hoganlovells.com



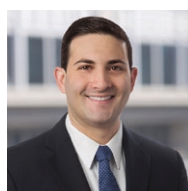
**Trey Hanbury**

Partner, Washington, D.C.  
T +1 202 637 5534  
trey.hanbury@hoganlovells.com



**Alexander Maltas**

Partner, Washington, D.C.  
T +1 202 637 5651  
alexander.maltas@hoganlovells.com



**Daniel Graulich**

Associate, Washington, D.C.  
T +1 202 637 4828  
daniel.graulich@hoganlovells.com

<sup>15</sup> RIF Order at paragraph 113, fn. 699.



# Shared economy and digital single market – Airbnb and the virtuous advocacy exercise of the Italian Competition Authority

The Italian Competition Authority (“ICA”), in exercising the powers referred to in Article 21 of Law 10 October 1990, No. 287, on 15 November 2017, delivered to the Italian Parliament some considerations concerning the potential restrictive impact on competition arising from certain provisions of Law Decree April 24, 2017, No. 50 (“L.D. 50/2017”) converted, with amendments, by Law 21 June 2017, No. 96 on *“urgent financial regulations, initiatives in favour of territorial authorities, further intervention for the areas affected by seismic events and development measures”*.

In particular, the legislation introduced by Article 4, paragraphs 5 and 5-bis, of L.D. 50/2017 on the short-term rentals’ tax regime<sup>1</sup> appears to be potentially capable of altering the competitive dynamics between different operators, with possible negative effects on end-users of short-term rental services (namely, tenants). This may occur to the extent that the legislation imposes a duty on players engaged in intermediation activities *“in case they collect the rent or fees related to the [short-term lease] agreements, or if they intervene in the payment of the aforementioned rent or fees”*, to operate *“as withholding agent”* [sostituto d’imposta], a 21% withholding tax rate on rent and fees and to arrange deposits (paragraph 5). Additionally, in the case of non-resident intermediaries in Italy without a permanent establishment, it permits the appointment of a tax representative in order to fulfill the obligations under the same article (paragraph 5-bis).<sup>2</sup>

As a preliminary observation, it is worth mentioning that the ICA stated that it was fully aware that the legislator’s intervention was aimed at achieving a fiscal public interest and to counteract tax avoidance. However, the introduction of the above-mentioned obligations did not appear to be proportionate to the pursuit of those aims, since it is considered that they could be pursued as effectively by means which do not concurrently lead to possible distortions of competition in the concerned field.

In particular, the legislation under scrutiny may in fact discourage the offer of digital payment systems by platforms which, as is well known, have simplified and at the same time promoted online transactions, thus contributing to the overall growth of the economic

system. In this context, the concerned tax intervention appears to be capable of altering the competitive dynamics between the managers of online platforms and between the various players of online platforms. This alteration could be to the detriment of those who adopt business models strongly characterised by the use of online payment instruments, which in recent years have been established in the digital economy as they are effective in promoting and expanding the range and quality of services offered.

Indeed, the tax obligation related to the role of withholding agent [sostituto d’imposta], representing a further administrative burden not directly linked to the business activity carried out by the sector’s players, could dis-incentivise intermediaries from making digital payment systems available to tenants on their platforms.

Moreover, the payment systems made available on the online platforms of some of the sector’s leading players are accompanied by the provision, always in favour of the tenants, of a series of commercial guarantees that neutralise the risks associated with the loss of the sums paid to the landlords where the intermediary service does not match the one actually offered on the platform or by the real estate intermediary. The use of digital payments through the platform therefore strengthens the tenants’ position, as their use in short-term lease agreements allows for access to, and the use of, additional guarantees not provided by law.

Indeed, tenants who have paid through an online platform can in a larger number of cases directly address the platform manager for possible reimbursement practices, resulting in greater predictability of their outcomes and a possible reduction in transaction costs.

The application of the obligations under Article 4, paragraphs 5 and 5-bis of L.D. 50/2017 would mainly affect those players who have adopted an entrepreneurial model with greater use of digital payment systems by consumers to whom additional forms of guarantee are granted.

<sup>1</sup> Paragraph 1 of Article 4 of L.D. 50/2017 defines short-term leases as follows: *“leases of residential real estate for a term of not more than 30 days, including those providing for the provision of linen and cleaning services of the premises, made by individuals, out of the business venture, either directly or through real estate intermediaries, or those who manage online portals, putting into contact people looking for a property with people who have a building unit to lease”*.

<sup>2</sup> See also Circular No. 24 of 12 October 2017 of the Italian Revenue Agency (paragraph 5a).

Therefore, the reduction in the use of digital payment systems by online platforms in short-term leases could penalise end-users, leading to a narrower and less varied offer, as well as having a potential negative impact on demand – no longer supported by commercial guarantees related to the use of digital payment instruments – thereby ultimately altering the competitive conditions that currently exist in the entire segment of the tourist offer of traditional and non-traditional tourist accommodation.

Lastly, peer-to-peer platform managers active in other sectors of the digital economy, playing an equally important role in putting in touch those who act in a non-business way for the conclusion of consumer-to-consumer contracts similar to short lease agreements concluded in the area covered by the legislative intervention, concerning both the sale of goods and the provision of services, are not addressed by the tax regulations envisaged by L.D. 50/2017. Even from the inter-sectorial point of view, therefore, the aforesaid regulatory intervention seems likely to create a possible asymmetry in the competitive dynamics existing within the different sectors of the digital economy, which should, on the contrary, be regulated in a consistent manner to the fullest extent possible, especially given the continuous evolution in the dynamics of supply and demand.

In order to meet the fiscal interest behind the legislation at issue and at the same time avoid producing competitive disadvantages between the different business models adopted by the players involved in real estate intermediation, also through the management of online portals with respect to short-term leases, the ICA considers that the new legislation at issue could provide for less onerous measures for the parties concerned, such as the current provision that imposes on intermediaries and on real estate online platforms certain tax information duties (Article 4, paragraph 4, L. D. No. 50/2017).

This obligation, in the light of the clarifications made by the Italian Revenue Agency in Circular No. 24 of 12 October 2017, appears to be proportionate, insofar as it does not alter the competition between the operators of the sector and has no effect on the choice of making digital payment systems available to consumers. In addition, this information obligation appears to allow the Tax Authority to have the information required to carry out any possible tax verification on revenues arising from short-term lease contracts falling within the scope of the legislation at issue.

The ICA asked the Italian Parliament in its opinion to take into due consideration these arguments and to amend the relevant laws, with particular reference to the short-term lease legislation and in the event of future regulatory interventions on the digital economy sector.

The position of the ICA is important in terms of harmonisation since it states two fundamental principles: (i) the competitive environment shall be considered in issuing a new regulation in order to create a level playing field in each and any relevant market, (ii) in the context of the shared economy and of the digital single market it clarifies that new business models are positive for competition and need to be preserved and sustained with a common set of rules at European level.



**Sabrina Borocci**

Partner, Milan

T +39 02 720252 384

sabrina.borocci@hoganlovells.com

## Update from Africa – recent competition law developments

As we have previously noted, there is a steady growth in competition legislation in Africa, with many countries seeing this as a means of not only regulating markets, but also as a policy tool. We examine some of the developments in the past couple of years in South Africa and the rest of Africa which highlight this trend.

In South Africa, the Competition Commission (“the Commission”) continues to flex its muscles. It has indicated an intention to punish parties who fail to comply with the merger regulation regime, and has published draft guidelines on the determination of administrative penalties to be levied on parties who have either failed to notify a merger or who have implemented a merger prior to obtaining approval. The Commission has also issued draft guidelines regarding the exchange of information between competitors. The Commission’s attitude to information exchange is very conservative, and concerns have been expressed that it may stifle legitimate interaction between competitors. The Commission is considering this feedback.

From a policy perspective, both the Minister responsible for competition policy, being the Minister of Economic Development (“the Minister”) and the competition authorities are very focused on using the tools of competition law to build an inclusive economy. This focus has in the past few years been particularly noticeable with respect to merger analysis, where public interest aspects have become very prominent. The Competition Act, 1998 (“the Act”) requires the South African competition authorities to consider not only whether a proposed merger substantially lessens or prevents competition, but also whether the merger can or cannot be approved on public interest grounds. In the past, the focus of public interest has been particularly on the effect of a merger on employment, but more recently the authorities have looked at other aspects, and have developed innovative remedies to address perceived public interest concerns.

Public interest remedies have featured prominently in some high-profile mergers over the past couple of years. For example, in the Coca-Cola Beverages Africa and various Coca-Cola bottling and related operations merger,<sup>1</sup> Coca-Cola sought to combine the bottling operations of their non-alcoholic ready-to-drink beverages businesses in Southern and East Africa to create a single entity. In addition to concerns

regarding employment, the competition authorities were concerned about the effect the transaction would have on access of third parties to resources, and the increased bargaining power of the merged entity resulting in the inability of others to compete effectively, as well as the negative impact on South Africa’s black economic empowerment initiatives. The Tribunal sought to remedy the above concerns by imposing the following conditions on the merging parties: to maintain employment levels for a period; to commit to a follow-on broad-based empowerment transaction; to invest in developing the downstream distribution and retail aspects of the South African business; and to provide suitable business skills training to black retailers who would sell the merged entity’s products.

Another example in this vein is the merger between Anheuser-Busch InBev SA/NV and SABMiller PLC,<sup>2</sup> where various public interest concerns relating to local producers, local suppliers and employment were raised. The Competition Tribunal (“the Tribunal”) approved the merger subject to various conditions, including undertakings by the merging parties to invest in agricultural development, to promote enterprise development, local manufacturing, exports and jobs, and to contribute to the improvement of society in general through sustainability and educational initiatives. Conditions relating to employment and black economic empowerment were also imposed.

This focus on public interest has also been apparent in the recent spate of mergers in the agro-processing space. Thus, in the proposed merger between Bayer AG and Monsanto Corporation, from a public interest perspective, aside from employment conditions, the Commission imposed conditions relating to support for emerging farmers. In the Dow/DuPont matter,<sup>3</sup> from a public interest perspective, the Tribunal considered the impact on warehousing and logistics companies, as well as the impact on R&D activities in South Africa, and

<sup>1</sup> *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* (LM243Mar15) [2016].

<sup>2</sup> *Anheuser-Busch InBev SA/NV and SABMiller PLC* (LM211Jan16) [2016].

<sup>3</sup> *DowDuPont Inc. v The Dow Chemical Company and E.I. Du Pont De Nemours and Company*, Case No LM030May16.

imposed a behavioural condition requiring the merged entity to maintain its R&D facilities in South Africa.

Most recently, in the proposed acquisition by a subsidiary of Sinopec of the South African subsidiary of Chevron, according to its press release, the Commission has recommended the imposition of conditions to address perceived concerns. Sinopec has agreed to a number of undertakings, including: establishing its head office in South Africa for its South African midstream and downstream operations and to use South Africa as the platform to oversee operations in the rest of Africa; investing in the Cape Town refinery; enhancing black economic empowerment, including by funding a development fund to develop small and black-owned businesses; and continuing local procurement as well as promoting exports of the South African manufactured products. The Tribunal must still consider the transaction, and these conditions may change.

The competition authorities are perceived as effective regulators, and government is proposing legislative amendments to the Act to enhance their powers to progress policy goals. The Minister of Economic Development mentioned in the Commission's most recent Annual Report that "*Competition policy has shifted in the past 12 months to the centre of policy discussions about building that inclusive economy. Our unique history of exclusion required special measures to reverse the deep legacy of the past.*"

To progress that goal, in December 2017 the Minister published a draft Competition Amendment Bill<sup>4</sup> which seeks to advance the structural and transformative objects of the Competition Act,<sup>5</sup> particularly in relation to high levels of concentration in certain markets and "*the racially skewed ownership of firms in the economy*".<sup>6</sup> Amendments to the merger regime are particularly relevant, as are proposed amendments to the provisions relating to market inquiries.

As regards mergers, the importance of public interest is highlighted and enhanced, and the public interest considerations are being widened to consider the effect on the spread of ownership, in particular the levels of

ownership by formerly disadvantaged South Africans. Creeping mergers, by way of a series of transactions, are also to be addressed.

As regards the sections of the Act relating to market inquiries, it is proposed that the Commission's powers be significantly enhanced, and it is recognised that the Commission will need to be adequately resourced. Significantly, it will be possible for remedies pursuant to a market inquiry to include divestiture.

The developments in South Africa have been directed at creating a more transformative, inclusive and progressive economy. As stated by the Minister of Economic Development, "*the aim of the Commission that competition policy be linked to wider economic policy is being realised. An integrated approach enables the public authorities to ensure that national economic goals and the constitutional vision of an inclusive society are achieved through the application of laws, use of fiscal and industrial measures and the building of broad partnerships in the economy*".<sup>7</sup>

Other African jurisdictions are watching developments in South Africa with interest. A number of countries also have a public interest component in their legislation, and have been using it to progress public interest imperatives such as local ownership and employment. They are also beginning to flex their muscles, and are not merely reviewing mergers but also seeking to stamp out anti-competitive practices.

For example, The Competition Authority of Kenya ("CAK") recently announced that it is about to embark upon an investigation of the Kenyan logistics and freight market, one of the key elements in Kenya's regional integration efforts, in an effort to address suspicions of collusion and price fixing among industry players. The investigation is expected to be finalised between June and December 2018 and follows similar investigations into the pay television, banking and agriculture markets. The CAK has also recently introduced their Leniency Program Guidelines<sup>8</sup> to encourage whistleblowers to come forward. South Africa's leniency programme has been particularly successful in the past in uncovering cartel conduct.

<sup>4</sup> Draft Competition Amendment Bill 2017, published in Government Gazette, No. 41294, Vol. 630, 1 December 2017.

<sup>5</sup> Act 89 of 1998.

<sup>6</sup> Draft Competition Amendment Bill 2017, page 6.

<sup>7</sup> Competition Commission Annual Report 2016–17, available at [www.compcom.co.za/wp-content/uploads/2014/09/Annual-Report-2016-17.pdf](http://www.compcom.co.za/wp-content/uploads/2014/09/Annual-Report-2016-17.pdf) [accessed 22 January 2018].

<sup>8</sup> Leniency Program Guidelines (Under Section 89A of the Competition Act No 12 of 2010), section 13.

In 2017 the Botswana Competition Authority announced proposed legislative amendments to the existing competition legislation,<sup>9</sup> which include allowing for the imposition of a fine for implementing mergers in contravention of the legislation, as well as the introduction of criminal sanctions for participating in cartel conduct.



**Lesley Morphet**  
Partner, Johannesburg  
T +27 11 523 6128  
lesley.morphet@hoganlovells.com

The Zambian Competition and Consumer Protection Commission (“CCPC”) recently published its draft Guidelines on Abuse of Dominance<sup>10</sup> for comments. The Guidelines are designed to “*give practical advice and guidance on the application of the relevant procedures and assessment methods for Abuse of Dominance cases*”.<sup>11</sup>

It can be seen that competition law is a focus in Africa, and the environment is ever-changing. Against this backdrop, it is essential for businesses to stay up to date with competition law developments and to ensure that they comply.

<sup>9</sup> See: <http://www.competitionauthority.co.bw/competition-authority%E2%80%99s-mandate-widen-include-consumer-protection> [accessed 22 January 2018].

<sup>10</sup> Draft Competition and Consumer Protection Commission Guideline on Abuse of Dominance Competition and Consumer Protection Commission Guideline on Abuse of Dominance.

<sup>11</sup> *Ibid*, Preamble.



# Hong Kong court rejects self-incrimination defense in antitrust investigation

On 3 October 2017, in the first court case heard under the Competition Ordinance (“Ordinance”), the Hong Kong Competition Tribunal (“Tribunal”) made an important clarification concerning the applicability of privilege against self-incrimination (“PSI”) to companies.

## Background

The proceedings leading up to the court decision were launched by an application from two respondent companies in connection with proceedings commenced by the Competition Commission (“HKCC”) for suspected bid-rigging. In the main proceedings, HKCC alleged that Nutanix co-ordinated four “dummy” bids to assist BT’s bid in response to an invitation to tender from the HK Young Women’s Christian Association for the supply and installation of an IT server system. Nutanix had an interest in the success of BT’s bid because BT proposed the use of a Nutanix system. Since the Hong Kong antitrust regime is a courts-based system, HKCC brought an action before the Tribunal accusing Nutanix and the other four companies of illegal cartel conduct.

Nutanix and BT requested that certain employee statements in HKCC’s court action be struck out because they allegedly self-incriminated the companies. The statements were made by employees of Nutanix (Mr A) and BT (Mr B and Mr C) in so-called section 42 interviews, under which the employees were compelled to answer questions in connection with HKCC’s investigation.

Nutanix and BT based their applications on section 45 of the Ordinance. Under section 45, a person is not excused from answering any question on the grounds that to do so might expose the person to a financial penalty or criminal proceedings, but no statement made by that person in answering any question is admissible *against that person* in those proceedings.

The companies argued that the relevant statements were inadmissible in the main proceedings on the grounds that the employees’ statements incriminated the company. In the case of Mr A, the specific question put before the Tribunal was whether he had made the incriminating statements in interview on behalf of the company or in his personal capacity. In other words, was Mr A the same “*person*” as the incriminated company for the purposes of section 45?

Nutanix argued that Mr A had represented the company throughout HKCC’s investigations, highlighting that the authority had corresponded with Mr A at his work address, including sending the section 42 notice to him there. The company also pointed to the fact that Mr A had the same legal representation as the company.

However, the Tribunal sided with HKCC, finding that the request to attend before HKCC was made personally to Mr A, and that “*where a s.42 notice is issued to a natural person, his obligation to attend before the [Competition] Commission is personal to him.*”

Nutanix and BT also argued that a company can only be represented by an employee, and that HKCC sought to impose their behaviour on the company in relation to the alleged illegal conduct. Logically, the companies argued, the same should be done for the interviews.

The Tribunal disagreed. It found that the section 42 notices were addressed to the employees personally, and hence the employees could not be viewed as acting on behalf of the companies at the interview. The Tribunal accepted that HKCC has the power to compel anyone to attend and, when the request is personally addressed, then that is the person who is being compelled to attend.

Ultimately, the message from the Tribunal is that the privilege can only be claimed by the person who is likely to be incriminated.

## Conclusions

In the context of antitrust investigations of this nature, the right to PSI for companies is on the books, but there are important limitations to its applicability. Following this court decision, HKCC may be tempted to find other means of obtaining the same evidence by way of obtaining the testimony of prosecution witnesses with a distinct “*identity*” from the company.

Against this background, it is important that companies and individuals alike understand in what capacity they attend interviews or provide information, and ensure each party receives independent legal advice if and when necessary.



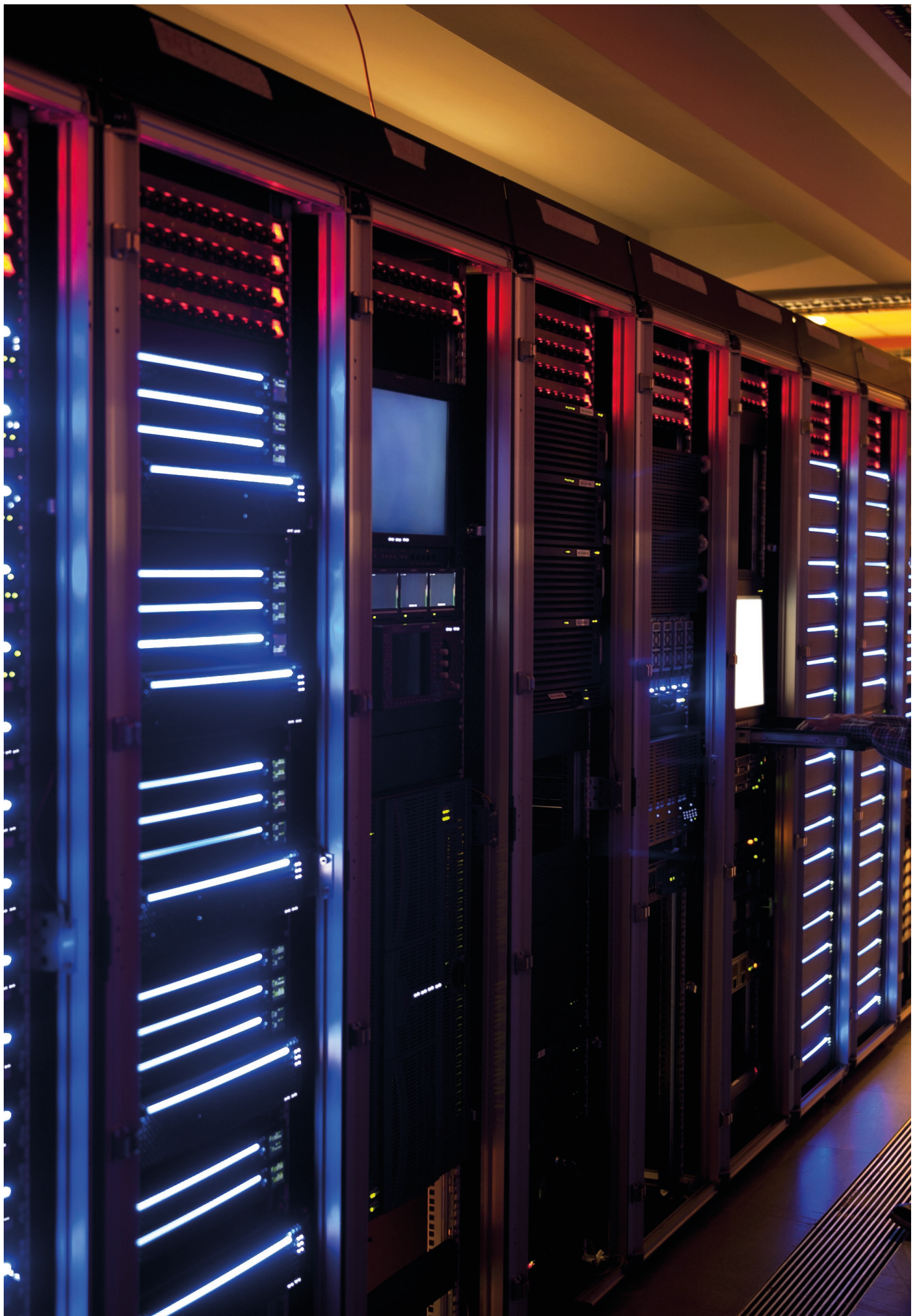


**Adrian Emch**  
Partner, Beijing  
T +86 10 6582 9510  
adrian.emch@hoganlovells.com



**Caroline Hibberd**  
Associate, Hong Kong  
T +852 2840 5978  
caroline.hibberd@hoganlovells.com





# Big data and competition: German FCO continues to lead the way

On 6 October 2017, the German Federal Cartel Office (“FCO”) launched its new series of papers on “*Competition and Consumer Protection in the Digital Economy*”. The first paper deals with “*Big Data and Competition*”.<sup>1</sup>

In the words of Andreas Mundt, president of the FCO, “*the special characteristics of digital markets have created new challenges for competition policy and enforcement.*” With its new series of papers the FCO continues the public debate on topical competition policy issues highlighting the interfaces between digitalisation, competition and consumer protection. The now published paper on “*Big Data and Competition*” explains the specifics of data-based, digital markets. It highlights the role data can play in competitive analysis and stresses the importance of data protection issues for competition law proceedings.

## 1. Data in the competitive analysis

The FCO clarifies that data based business models can have pro-competitive as well as anti-competitive effects. Regarding potentially critical topics, the paper mainly discusses the following scenarios where data could negatively impact on competition: (1) data as a source of market power; (2) data as the origin of increased market transparency facilitating collusion; (3) data pooling and cooperation between competitors; and (4) data driven anti-competitive behaviour. Finally, the FCO briefly addresses the interplay between data protection and competition law (5).

### 1.1 Data as a source of market power

According to the FCO, access to data can establish market entry barriers and contribute to the market power of specific companies. The FCO names two criteria which would need to be considered on a case-by-case basis:

- Is the access to specific data important for successful operations in the relevant market?
- Can other market players either collect the relevant data themselves or access it via third parties?

As a competitively critical example, the FCO refers to smaller or new market players which cannot gather data in an amount comparable to larger market players. This could lead to a “*data advantage*” of the established market players which is out of reach for smaller competitors.

While this theory is currently discussed in many articles and at conferences, any real-life examples of anti-competitive foreclosure due to a lack of market access are yet to be identified by the competition authorities. This does not come as a surprise because the parallel offline “*essential facilities doctrine*”, which deals with access to infrastructure of dominant companies, has very high thresholds. Interestingly, the FCO acknowledges in its paper that in many cases market access to the data of a dominant company may be a less important precondition for successful operation on the market than the public debate suggests.

### 1.2 Data, market transparency and competition

The FCO recognises that the availability of data and increased transparency in the market can lead to positive effects, e.g. decreasing information asymmetries and increasing competition on price and quality. However, the FCO emphasises that it could also lead to restrictions of competition. According to the FCO, highly concentrated and transparent markets are prone to collusion. The possibility of permanent data comparison could facilitate mutual surveillance of competitors and identification of deviation from potential agreements among competitors.

Again, this is not a unique factor of data-rich markets as also in offline markets many companies share information individually or through trade associations. Digital players need to ensure that they adapt a compliance culture based on existing rules for information exchange and “*update*” this based on the specifics of data markets.

<sup>1</sup> Bundeskartellamt, press release: “New series of Bundeskartellamt papers on ‘Competition and Consumer Protection in the Digital Economy’”, 6 October 2017, available at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2017/06\\_10\\_2017\\_Schriftenreihe\\_Digitales.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2017/06_10_2017_Schriftenreihe_Digitales.html) [accessed 16 January 2018].

### 1.3 Data pooling and cooperation

The FCO accepts that cooperation between companies for the collection and pooling of data can generate efficiencies and pro-competitive effects, especially in the context of connected industry applications and the Internet of Things. However, according to the FCO, cooperation between competitors exchanging and pooling competitively sensitive data could facilitate collusion, hamper access to data for third parties and establish market entry barriers. Competition law does not generally prohibit such cooperation. In the competitive assessment, cooperation between competitors would be more difficult to justify than cooperation between non-competing companies operating on different market levels.

### 1.4 Data driven anti-competitive conduct

Besides these more structural concerns regarding data and competition, the FCO discusses three scenarios in which access and use of data could constitute anti-competitive conduct.

- First, the collection and use of data could lead to anti-competitive concerns in merger control cases. This would especially be the case, according to the FCO, if the merger's (main) purpose were to acquire access to new data, leading to a higher concentration of relevant data post-merger which could then hinder market entry and the expansion of other companies. In addition, a merger in data driven markets could have vertical or conglomerate effects if the merger enables a large company to hamper or deny its competitors on upstream or downstream markets access to data.
- Second, a dominant player hampering or denying its competitor's access to data could lead to anti-competitive abuse of dominance, especially in a discrimination scenario or in an "*essential facility*" situation. As highlighted above, there aren't yet any real life cases which provide more guidance. The threshold to establish abuse in such a case should be high as there is no general right to access a competitor's database.

- Third, availability of data could lead to price discrimination, e.g. in the context of individualised pricing. Although the FCO notes that price discrimination is not necessarily a competition law issue, the paper explains that a high degree of price discrimination or fully individualised prices could lead to anti-competitive effects. This would particularly be the case if individualised pricing would increase information asymmetries as competition would lose its protective function and consumers would be unable to draw price related conclusions from the market. This category demonstrates how cautious competition law authorities need to be in applying new theories of harm to data driven markets. Whilst the FCO may consider the individualisation of prices as problematic due to a lack of transparency, it also needs to explain the possible issues connected to increased market transparency (see above 1.2).

## 2. Data privacy and competition law

Finally, the FCO draws attention to potential anti-competitive implications in relation to data privacy aspects. The FCO states that the way in which companies handle data and apply data protection rules could be regarded as a non-price related competition parameter. In addition, the FCO refers to its on-going investigation into a potential abuse of dominance through specific clauses in general terms and conditions regarding the use of customer data of an online platform. Although the enforcement of data protection regulations generally does not lie with the competition authorities, this shows that competition law enforcers are increasingly moving into the data privacy arena, assessing potential anti-competitive implications of the use of data and the applicable data privacy rules.

### 3. Conclusion

The FCO's most recently published paper shows that Big Data remains on top of the policy and enforcement agenda in Europe. The FCO's paper follows earlier publications and statements by the German FCO on Big Data and Digital Markets, i.e. the Joint Paper of the FCO and the French Competition Authority on "*Big Data and Competition*", the White Book on Digital Platforms of the German Ministry of Economic Affairs and the most recent ninth amendment of the German competition law. It clearly underlines Germany's ambition to play a lead role in the adaptation of competition law enforcement to digital markets, specifically to Big Data. Questions relating to data access and property rights are also being examined by the European Commission in the context of its Digital Single Market initiative.<sup>2</sup>

Companies and other stakeholders are encouraged to follow the public debate and increased enforcement activity carefully. They should consider assessing their data-based business models against the progressively evolving competition law standards and adapting existing compliance policies to consider the tougher stance taken by competition law authorities.



**Falk Schöning**

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



**Christian Ritz**

Senior Associate, Munich  
T +49 89 29012 128  
christian.ritz@hoganlovells.com

---

<sup>2</sup> European Commission, policy web page: "Building a European data economy", available at <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy> [accessed 16 January 2018].

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

Our offices  
Associated offices

[www.hoganlovells.com](http://www.hoganlovells.com)

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

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

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

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

© Hogan Lovells 2018. All rights reserved. 12269\_EUd\_0318