Antitrust, Competition and Economic Regulation Quarterly Newsletter

Spring 2016

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Global laws inconsistent when competitors talk among themselves

Exchanges between businesses can give rise to antitrust violations in some countries, but not in others. With recent court decisions in Europe, the treatment of exchanges of competitively sensitive information among competitors represents a new frontier in antitrust enforcement.

These exchanges may sometimes take place without any other unlawful conduct such as price-fixing, and can take place directly through meetings, emails or phone calls among competitors, or indirectly, such as through an industry association or a market intelligence firm.

There is little consistency in how antitrust enforcers in different countries approach information-exchange issues. In the United States, absent any other evidence of a price-fixing agreement, exchanges of competitively sensitive information are typically evaluated under the rule of reason.

But several other jurisdictions, in particular the European Union, consider information exchanges hard-core antitrust violations. And in the United States, Europe and other jurisdictions, information exchanges may lead to government investigations and an avalanche of civil lawsuits with substantial damages exposure.

Both antitrust advisors and enforcers may find it challenging to know where to draw the lines because information exchange cases are murkier than "smoke-filled room" cases.

The 'hard-core' approach

Even in the absence of an explicit agreement 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. This typically 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."

European competition law prohibits certain practices under the doctrine of "concerted practice by object." Exchanges between competitors of their individualized plans regarding future prices or output would normally be considered anti-competitive by their very nature or "by object" and are 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.

For example, in the January Eturas decision, the European Court of Justice held that travel agencies that were aware of a proposal communicated by email from Eturas, a third party, to uniformly cap their discounts, but that failed to distance themselves from it, violated EU competition law, as did Eturas, which facilitated the information exchange.

Similarly, in the 2015 Dole case, the Court of Justice held that banana importers who routinely advised one another of factors likely to affect prices or output (such as banana stocks and weather) also violated EU competition law.

In both cases, the court held that there was a violation "by object" and that the companies involved had failed to rebut the presumption of illegality. In both cases enforcers granted leniency to the participant in the arrangement who informed the authorities about the practices. In both cases substantial fines were imposed, and the firms involved may face civil liability under the new EU directive on competition law damages claims.

Several European member-state competition authorities have taken a similar approach, as have enforcers in other countries, including Brazil (where it may be prosecuted as a crime) and China.

The rule of reason

In contrast, information exchanges are not presumptively illegal under U.S. law unless they are part of an agreement to fix prices or some other per se illegal conduct. The rule of reason is the standard mode of analysis in the United States, but a "quick look" may be used in cases involving a practice that is facially anti-competitive — in the words of the U.S. Supreme Court in California Dental, where the likelihood of anti-competitive effects is "obvious" to an observer "with even a rudimentary understanding of economics."

The "quick look" is the closest U.S. analogy to the European doctrine of concerted practice by object.

The per se rule in the United States is limited to cases involving agreements that are so plainly anti-competitive and so unlikely to have any redeeming virtues that no analysis is required to establish illegality, such as price-fixing, bid rigging or market allocation. But most cases involving the exchange of information among competitors have been evaluated under the rule of reason. Some other countries, like Canada, follow the U.S. approach.

In the United States the greatest threat to companies involved in information exchanges is likely to involve potential civil liability. Because of joint and several liability and the prospect for class actions, the potential civil liabilities to private plaintiffs may be very high, even if the price effects on any particular product are relatively small.

Information exchanges warrant special caution by antitrust advisors. Even antitrust savvy business executives may not be aware of the possible risks of information exchanges, especially when the sharing of information happens through benchmarking against rivals or through a third party, such as an industry association or a market research organization. Many companies require that the general counsel's office be consulted about competitor communications, but information exchanges through third parties may fly under the radar.

For all these reasons, such conduct is hard for antitrust counsel to detect and advise on, especially from a global perspective.

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Cartel activity is criminalised in South Africa

On 22 April 2016, the President of the Republic of South Africa officially approved the entry into force of the criminalisation provisions for cartel conduct in South Africa.

South Africa now joins many other jurisdictions around the world which have criminal enforcement as part of their antitrust enforcement toolbox. Global corporations need to factor this new South African criminal regime into their antitrust compliance and defence strategies.

The new criminal provisions

The Competition Amendment Act was enacted in 2009, but involved a phased implementation. Section 73A of the Competition Amendment Act, which governs the criminalisation of cartel conduct, has been in the draft rulebook for over 8 years, but was only finally published in South Africa's official government gazette on 22 April 2016 with an entry into force set for 1 May 2016.

As of 1 May 2016, company directors and managers can face fines or terms of imprisonment if they cause their companies to take part in cartel conduct. Cartel conduct includes price fixing, dividing markets, and collusive tendering/bid rigging. The offence also applies to directors and managers who have "knowingly acquiesced" in a company's involvement in the cartel activity while having "actual knowledge" of it.

Section 73A(4) and (5) of the Competition Amendment Act have not been commenced. These provisions state (i) that a finding by the Competition Tribunal or the Competition Appeal Court that a company has engaged in cartel conduct is prima facie proof that the company has engaged in that conduct; and (ii) that companies are not permitted directly or indirectly to pay the fines or legal costs of employees charged with cartel offences. These provisions had raised constitutional concerns, including questions of whether they undermined the right to a fair trial or the right of an accused to be considered innocent until proven guilty.

Impact

The criminal prosecution of individuals will not be conducted by the Competition Commission, but by the National Prosecuting Authority. The final decision on whether or not to prosecute individuals will lie with the National Prosecuting Authority, although the Competition Commission may make submissions to the National Prosecuting Authority in respect of individuals that it considers to be "deserving of leniency". As a result of this dual process, going forward, considerable cooperation and alignment between the National Prosecuting Authority and the Commission will be required, and it is to be hoped that negotiations to sign a MOU are well underway.

Criminal sanctions are increasingly a core part of the antitrust enforcement toolbox across the world.

The US has a long track record of criminal prosecution, incarceration, and criminal fines for cartel conduct. In the 2015 Yates memorandum, the Department of Justice formally announced a policy that it will vigorously pursue the prosecution of culpable individuals responsible for corporate wrongdoing. In the UK, changes to the criminal cartel offence were recently introduced to make it easier to bring prosecutions, and the UK Competition and Markets Authority has been building its capacity and skills to pursue criminal cases.

Global corporations need to factor in individual criminal liability into their strategies for antitrust investigations. A key issue is that, in relation to conduct relating to countries with a criminal regime, individuals may be less willing to co-operate with their employers in the investigation process as a result of their interest in defending their personal position. South Africa is now an additional jurisdiction where these considerations must be taken into account.

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Antitrust regulators emphasize importance of innovation for merger control assessment

The European Commission has published a policy brief on the role of innovation in merger control within the European Union (EU) outlining the Commission's approach to the assessment of innovation in the context of merger control. In addition, EU Commissioner Vestager in a speech on 18 April 2016, in line with previous announcements, signalled the Commission's intention to re-examine its thresholds for notification with a view to enabling the Commission to examine the acquisition of innovators with "a lot of good ideas but not yet much in the way of sales."

The Commission's approach is largely mirrored by recent practice of the FTC and the DOJ when assessing the impact of a merger on innovation. The US agencies often focus on the effect that a pending transaction will likely have on innovation, even if the competitive significance of the target company is not fully reflected by its current sales.

Background

The importance of innovation as a factor in merger control has risen in recent years. Because technological development is now fundamental to the running of a successful business across many industries innovation will play a key role in the assessment of future transactions.

In both the EU and the US, the framework for merger control allows the authorities to assess the impact of mergers and acquisitions on innovation within the industry concerned. The authorities can regard the potential competitive harm caused by a reduction in innovation in the market as equal to or greater than the potential harm caused by increased prices and reduced output. In an increasingly tech-savvy legal environment, innovation can therefore play a key role in the assessment of mergers as the Commission's policy brief underlines.

The role of innovation in merger control

The policy brief explains the fact that the effect on innovation is a key concern for the Commission in its merger investigations. The brief explicitly acknowledges that the potential loss of innovation in the market often goes to the heart of the anti-competitive effects of a merger. The Commission states that, with regard to horizontal mergers, the innovation potential of the merging companies is taken into account regardless of their market shares based on sales revenue. This position can make it more difficult to achieve merger clearance if the merging parties are significant competitors in innovation, but it may also help the merging parties convince the Commission (and the US authorities) that the competitive significance of other companies whose current market shares are low should be given more weight in the analysis.

Commissioner Vestager reiterated the Commission's approach in a speech when she noted that one of the simplest defences against innovation is to buy up rivals that are working to develop innovative products. The Commissioner's comments on innovation thus complement the approach set out in the policy brief by focusing on innovation as a key competitive concern in EU merger control.

Also in the US, the DOJ and the FTC in recent decisions have focused on both current competition and future competition for next-generation products yet to be developed. This means that in dynamic markets, a relatively small competitor may be a much more significant competitive constraint than its current market share would indicate. This can be the case, for example, where the smaller player has promising pipeline products. Innovation can also affect the definition of the relevant product market – if the industry is rapidly evolving, the relevant product market may be broader than a static snapshot of the current offerings available to consumers.

Efficiencies

The Commission, like the US antitrust agencies, also considers the potential positive effects of a merger (efficiencies), and will take any potential improvements in innovation into account in cases where these positive effects may also lead to benefits for consumers and are specific to the merger at hand. In analysing efficiencies, the Commission will examine the rationale behind the deal. For example, the merged entity may combine research and development (R&D) programs that will lead to more innovation on the market.

However, the merging parties carry the burden of proving that the claimed efficiencies. It can be difficult to substantiate innovation-based efficiencies claims as efficiencies should be evident in the short-term and innovation success is often difficult to predict. Moreover, innovation efficiencies can be viewed by the antitrust agencies as reductions in innovation competition, so merging parties must be very careful in describing such cost reductions.

Difficulties in defining innovation

Despite the authorities' regular practice in including innovation amongst the factors to be considered when assessing a merger, difficulties with the current framework still remain. Innovation can be complicated to assess correctly. This problem is exacerbated by the fact that the EU and US legal frameworks for merger control do not at present precisely define the concept of innovation.

In industries such as life sciences, innovation can be assessed in a relatively objective manner through the examination of clinical trials. In recent cases in this industry the Commission was able to quantify the effects of merger on innovation by analysing recent developments in R&D by the merging parties.

However, in other industries, providing evidence of the effects of a transaction on innovation is less straightforward. Nevertheless, the Commission's policy brief is a clear indication of a willingness to consider all available evidence in assessing potential effects on innovation. This evidence is of critical importance, and the Commission examines the internal documents of the parties to a transaction in order to gain an insight into their own view on innovation and potential future market trends. If necessary, the Commission will also obtain advice and insight from neutral experts in the industry field affected by the transaction at hand.

Conclusions

Parties to a potential merger are best advised to consider the Commission's approach to innovation long before beginning the notification and filing process. The importance that the Commission and other antitrust authorities give to innovation in assessing the competitive effects of a merger should not be underestimated.

In particular, internal documents often play a key role in the authorities' investigations and decision-making, and thus the drafting of any documents that concern the innovative landscape of a market should be carefully considered. In particular, the fact that these documents may ultimately form the basis for the antitrust authorities' decisions should be kept in mind at all times.

Finally, large-scale international mergers triggering merger control review in Asia, as well as in Europe and the USA, require a truly global strategy. In Asia, antitrust, industrial policy, and protectionism are often intertwined and innovation and IP issues are often at the forefront of high tech mergers. In addition, merging parties should be aware that authorities throughout the world cooperate and exchange information increasingly often during merger investigations. Accordingly, companies need to develop innovative merger control strategies when dealing with innovation and merger control.

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European Commission publishes interim report in sector inquiry on electricity capacity mechanisms

On 13 April 2016, the European Commission published an interim report in its sector inquiry on electricity capacity mechanisms it had launched in April 2015, its first-ever sector inquiry in the State aid area. In its press release, the Commission emphasised that capacity mechanisms can increase security of electricity supply but stressed that many Member States must be more thorough in assessing whether they are necessary and in ensuring a targeted and cost-effective design.

Background

Electricity capacity mechanisms, i.e. Member States taking measures to ensure the availability of sufficient electric energy resources and their treatment under EU State aid law have been widely debated for years. They can encourage investment in new or existing power plants and other measures to ensure adequacy of electricity supply. The ultimate aim is to avoid black-outs and ensure security of electricity supply.

In its inquiry, the Commission assesses whether capacity mechanisms achieve their goal to ensure adequate electricity supply without distorting competition or trade in the EU Single Market. The sector inquiry complements the Commission's Energy Union Strategy to create a connected, integrated and secure energy market in Europe. It is limited to the following eleven Member States: Belgium, Croatia, Denmark, France, Germany, Ireland, Italy, Poland, Portugal, Spain and Sweden.

Before launching the State aid sector inquiry, the Commission had already taken two decisions on electricity capacity mechanisms: in July 2014, it approved the United Kingdom's capacity mechanism. Against this decision, two applications for annulment are currently pending at the General Court of the EU. Further, in October 2014, the Commission decided that an interruptibility service for the electricity system in Greece and its financing did not constitute State aid.

What steps have already been taken?

On 29 April 2015, the Commission launched its State aid sector inquiry into electricity capacity mechanisms. It sent information requests to over 200 actors, including public bodies, energy regulators, network operators and market participants commercially active in the eleven Member States subject to the inquiry.

On 13 November 2015, the Commission opened two separate formal investigation procedures under State aid rules against France, one about plans to remunerate electricity capacity in a country-wide capacity mechanism and another one regarding a tender for a new gas-fired power plant in Brittany.

Interim report of the electricity capacity mechanisms sector inquiry

On 13 April 2016, the Commission published an interim report of the sector inquiry, as well as an extensive staff working document. The Commission says it received 124 replies to its requests for information. Based on these, it found 28 capacity mechanisms and categorised them in six different types. Amongst those, the most prevalent appears to be a strategic reserve, by which the State pays specific power plants to start operating in case of need.

The Commission sees a general trend towards more open and inclusive mechanisms, which are in principle open to participation from all categories of capacity providers. According to the Commission, to create a true Energy Union and ensure costs for consumers and companies are kept to a minimum, capacity mechanisms should be open to all types of providers, domestic or foreign, regardless of technology.

However, the Commission's interim report also points to a lack of proper and consistent analysis by many Member States of the actual need for capacity mechanisms. In the Commission's view, it also appears that some capacity mechanisms in place could be better targeted and more cost effective. The Commission stressed that these findings did not prejudge the Commission's assessment of the compatibility with EU State aid rules of any individual capacity mechanism, in particular based on its 2014 Guidelines on State aid for environmental protection and energy.

Next steps

The Commission's interim report and staff working document will be open for public consultation until 6 July 2016. Member States, stakeholders in the electricity sector, and others are invited to submit comments. The Commission expects to publish a final report on the results of the sector inquiry later this year.

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DOJ action against ValueAct signals more caution for minority investors and activist stockholders

On 4 April 2016, the U.S. Department of Justice (DOJ) filed a complaint in federal court against activist investor ValueAct Capital (ValueAct) for violating the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).

The complaint alleges that minority investments of over $2.5bn in Halliburton Company (Halliburton) and Baker Hughes Incorporated (Baker Hughes), after they had announced an agreement to merge, by two of ValueAct's affiliated funds fell outside the HSR Act's so-called investment-only exemption and therefore were subject to premerger notification requirements.

This enforcement action follows a similar proceeding brought in August 2015 by the Federal Trade Commission (FTC) against Third Point, LLC (and three affiliated investment funds), another activist investor that, like ValueAct, relied on the investment-only exemption to the HSR Act notification requirements. Taken together, these cases reemphasize the need for investors to be cautious when relying on the investment-only exemption. The cases reveal that the U.S. antitrust agencies are aggressively enforcing their narrow interpretation of the exemption, particularly when it comes to activist investors.

The DOJ complaint against ValueAct, like the FTC's allegations against Third Point, focuses on whether ValueAct's actions and statements were consistent with an investment-only intent. Under the HSR Act, if an acquisition of voting securities of a public or private corporation would result in certain threshold tests being met, the "acquiring person" and the "acquired person" generally must (a) submit a premerger notification to the U.S. antitrust agencies and (b) observe a waiting period before the acquiring person may acquire such voting securities. These notification and waiting period requirements do not, however, apply if the acquisition falls within an HSR Act exemption—including the HSR Act's exemption for acquisitions made solely for the "purpose of investment."

Although ValueAct apparently sought to rely upon this investment-only exemption in connection with the investments in Halliburton and Baker Hughes, the DOJ complaint alleges that ValueAct's actions and public statements demonstrated a clear intention to influence the business strategies of the two companies – facts inconsistent with an investment-only intent. Therefore, according to the DOJ, ValueAct could not rely on the investment-only exemption to justify its failure to file HSR notifications and observe the HSR waiting period before acquiring shares valued in excess of the HSR threshold tests.

The DOJ is seeking a civil penalty of at least US$19m and a restraint against ValueAct from any future violations of the HSR Act. The complaint notes that this was the third violation of the HSR Act that ValueAct has committed by acquiring securities without filing the necessary notifications. The previous two violations resulted in no enforcement action and a settlement of $1.1m, respectively.

Background

On 17 November 2014, Halliburton and Baker Hughes announced their plans to merge. In December 2014, ValueAct Master Capital Fund, L.P. (Master Fund) began purchasing Halliburton voting shares. By December 5, 2014, Master Fund held in excess of $75.9m worth of Halliburton voting shares, exceeding the then-applicable HSR size-of-transaction threshold test. Master Fund continued to acquire Halliburton shares, holding in excess of $1.4bn worth of such shares by 30 June 2015, but did not file an HSR notification to report its acquisition of Halliburton shares. By 27 January 2016, Master Fund had sold a sufficient number of Halliburton shares so that it held less than the applicable HSR size-of-transaction threshold amount. As a result, according to the DOJ, Halliburton was in violation of the HSR Act between 5 December 2014 and 27 January 2016. Maximum penalties for this violation would be $16,000/day for each day Master Fund was in violation of the HSR Act.

Toward the end of November 2014, Master Fund began purchasing voting shares of Baker Hughes. By 1 December 2014, it held in excess of $75.9m worth of voting shares of Baker Hughes, exceeding the then-applicable HSR size-of-transaction threshold test. After subsequent acquisitions of Baker Hughes shares, on 15 January 2015, Master Fund held over $1.2bn worth of such shares. According to the DOJ, Master Fund's violation of the HSR Act therefore began on 1 December 2014, and continues to the present because it still holds Baker Hughes shares valued over the HSR size-of-transaction threshold test. Again, maximum penalties are $16,000/day for each day of the violation.

In February 2015, ValueAct Co-Invest International, L.P.[1] (Co-Invest Fund), another affiliated entity of ValueAct, began purchasing voting shares of Halliburton. By 10 March 2015, it held Halliburton shares valued over the HSR size-of-transaction threshold test (then $76.3m). By 22 January 2016, it had sold sufficient Halliburton shares so it no longer held Halliburton shares valued over the size-of-transaction threshold test. According to the DOJ, it was therefore in violation of the HSR Act from 10 March 2015 through 22 January 2016, again with maximum penalties of $16,000/day for each day of the violation.

The HSR investment-only exemption

Under the "solely for the purpose of investment" exemption of the HSR Act, "[a]n acquisition of voting securities shall be exempt from the requirements of the [HSR] act… 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).

1 Co-Invest Fund does not share the same ultimate parent entity with Master Fund and is therefore considered a separate entity from Master Fund for HSR purposes.

In practice, merely exercising voting rights is not inconsistent with an investment-only purpose. However, the FTC has indicated that 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.

FTC Statement of Basis and Purpose for the HSR Regulations (31 July 1978).

DOJ Allegations

The DOJ complaint claims that the investment-only exemption of the HSR Act does not apply to the two ValueAct funds' acquisitions of Halliburton and Baker Hughes voting shares. The DOJ supports this claim by alleging the following:

- When Value Act began acquiring shares of Halliburton and Baker Hughes, soon after the announcement of their merger, ValueAct "anticipated influencing the business decisions of the companies as the merger process unfolded." Complaint at # 3. For example, ValueAct told its investors that its purchase of shares in the companies allowed it to "be a strong advocate for the deal to close" and, should the merger encounter regulatory hurdles, positioned ValueAct "to help develop the new terms" of the transaction. Id.

- ValueAct "met frequently with executives of both companies." Id. at #4. "From December 2014 through January 2016, ValueAct met in person or had teleconferences more than fifteen times with senior management of Halliburton or Baker Hughes, including meeting multiple times with the CEOs of both companies. ValueAct partners also exchanged a number of emails with management at both firms about the merger and the companies' respective operations." Id. at #26.
- After crossing the HSR size-of-transaction threshold on December 1, 2014, ValueAct's CEO met with Baker Hughes's CEO and emphasized the importance of Baker Hughes focusing on certain opportunities, whether or not the merger occurred. Id. at #27.
- On January 16, 2015, ValueAct filed a Schedule 13D with the Securities and Exchange Commission (SEC) disclosing its stake in Baker Hughes and noting that "it might discuss 'competitive and strategic matters' with Baker Hughes and propose 'changes in [Baker Hughes'] operations.'" Id. at #28.
- In March 2015, ValueAct contacted Halliburton and offered to help with the shareholder vote on the merger. Id. at #30.
- On 13 May 2015, ValueAct met with Halliburton's CEO to discuss "actions that Halliburton could take in an attempt to achieve its target merger synergies." Id. at #31.
- On 31 August 2015, ValueAct met with Baker Hughes's CEO to discuss selling individual Baker Hughes segments if the merger ran into problems. Id. at #34. ValueAct also discussed with Halliburton restructuring the merger in August and again in September 2015. Id. at #36.
- At an 18 September 2015 meeting with Halliburton's CEO, ValueAct shared Baker Hughes's plans if the merger did not close. Id. at #37. According to the DOJ, "ValueAct offered to use its position as a shareholder to pressure Baker Hughes's management to change its business strategy in ways that could affect Baker Hughes's competitive future." Id.
- In September 2015, ValueAct met with Halliburton's CEO to discuss plans for executive compensation changes. Id. at #32. ValueAct had reached out to Halliburton's CEO to schedule this meeting on 14 July 2015, and may have been considering this action as early as December 2014. Id. at #24.
- On 5 November 2015, ValueAct made a detailed presentation to Baker Hughes's CEO "proposing operational and strategic changes to the Company" Id. at #39. ValueAct also "lobbied Halliburton's senior management to pursue alternative ways to get the deal done." Id.

The DOJ complaint concludes that these actions demonstrate ValueAct's plan "from the outset to take steps to influence the business decisions of both companies" as they navigated the merger process. Id. at #4. According to the DOJ complaint, ValueAct:

Intended to use its position as a major shareholder [of both] companies to obtain access to management, to learn information about the merger and the companies' strategies in private conversations with senior executives, to influence those executives to improve the chances that the merger would be completed, and to influence other business decisions whether or not the merger went forward. Id. at #5.

In the DOJ's view, because of these activites, ValueAct could not invoke the "investment-only exemption" to justify its failure to report its acquisitions under the HSR Act.

Key Takeaways

The DOJ action against ValueAct, coupled with the FTC's action against Third Point, underscore the need to proceed with caution before relying on the HSR investment-only exemption, even when acquiring and holding only a minority stake in a corporation. This is especially true for activist funds whose publicly announced strategy may be to pursue "'active, constructive involvement' in the management of the companies in which [they] invest." Complaint at #12 (quoting ValueAct's website).

In the view of the DOJ and the FTC, the investment-only exemption would not be available to acquiring persons who request and/or attend meetings with an issuer's management or board of directors to influence the issuer with respect to corporate decisions, or who recommend that the issuer undertake certain actions (including, among other things, actions related to executive compensation, strategy, cost cutting measures, or merger or acquisition agreements). Public or even internal consideration of seeking a board seat, soliciting new directors, or advocating for a change of directors could also be inconsistent with the exemption.

Moreover, because the exemption is not available if, among other things, the acquiring person has the subjective intent to influence management of the issuer, it is not only the acquiring person's actual acts that may make the exemption unavailable. The U.S. antitrust agencies will often examine, in addition to a company's actions with respect to an issuer, its public statements (including those that articulate general investment strategies), its SEC filings concerning the issuer, and its internal documents, including e-mails and other communications with its own investors. Of course, any communication (whether oral or in writing) between the acquiring person and management or directors of the issuer will also be relevant to assessing the acquiring person's subjective intent to influence management of the issuer.

The investment-only exemption may also be unavailable if the acquiring person holds an ownership interest greater than 10% in a competitor of the issuer, or holds any interest in a competitor of the issuer other than solely for investment purposes. Therefore, before relying on this exemption, the acquiring person should review its other holdings and contemplated acquisitions.

Given that the U.S. antitrust agencies have demonstrated an aggressive approach to enforcing the limits of the investment-only exemption, it is advisable for acquiring persons to exercise caution and consult with experienced HSR Act counsel before relying on the investment-only exemption to complete an acquisition of voting securities (even if only a small percentage of an issuer's outstanding voting securities).

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European Commission publishes issues paper with initial findings from e-commerce sector inquiry

On 18 March 2016, the European Commission published an issues paper on geo-blocking in e-commerce containing its initial findings from the e-commerce sector inquiry it launched on 6 May 2015. The Commission stated that geo-blocking practices are widespread and reconfirmed its intention to assess such practices under the EU antitrust rules and to propose further legislative action to address what it sees as unjustified barriers to cross-border e-commerce.

Background

The Digital Single Market (DSM) strategy presented in May 2015 contains 16 initiatives in a variety of fields such as telecommunication, consumer rights and Big Data, each of which is intended to bring the EU one step closer to a digital single market.

One of the issues focused on by the Commission as part of the DSM strategy is unjustified geo-blocking. Geo-blocking refers to practices used by online sellers that result in the denial of access to websites based in other Member States. Either consumers are unable to access websites in other Member States or they can access but not purchase products or services from a website in other Member States, or consumers are re-routed to a local website of the same company which may have different prices or a different product or service.

The Commission considers in its DSM strategy that, because it limits consumer opportunities and choice, geo-blocking is a significant cause of consumer dissatisfaction and of fragmentation of the Internal Market. Although the Commission accepts that geo-blocking can be justified in some circumstances, it also considers that it may amount to a restriction of competition or an abuse of dominance contrary to Article 101 and 102 of the Treaty on the Functioning of the European Union.

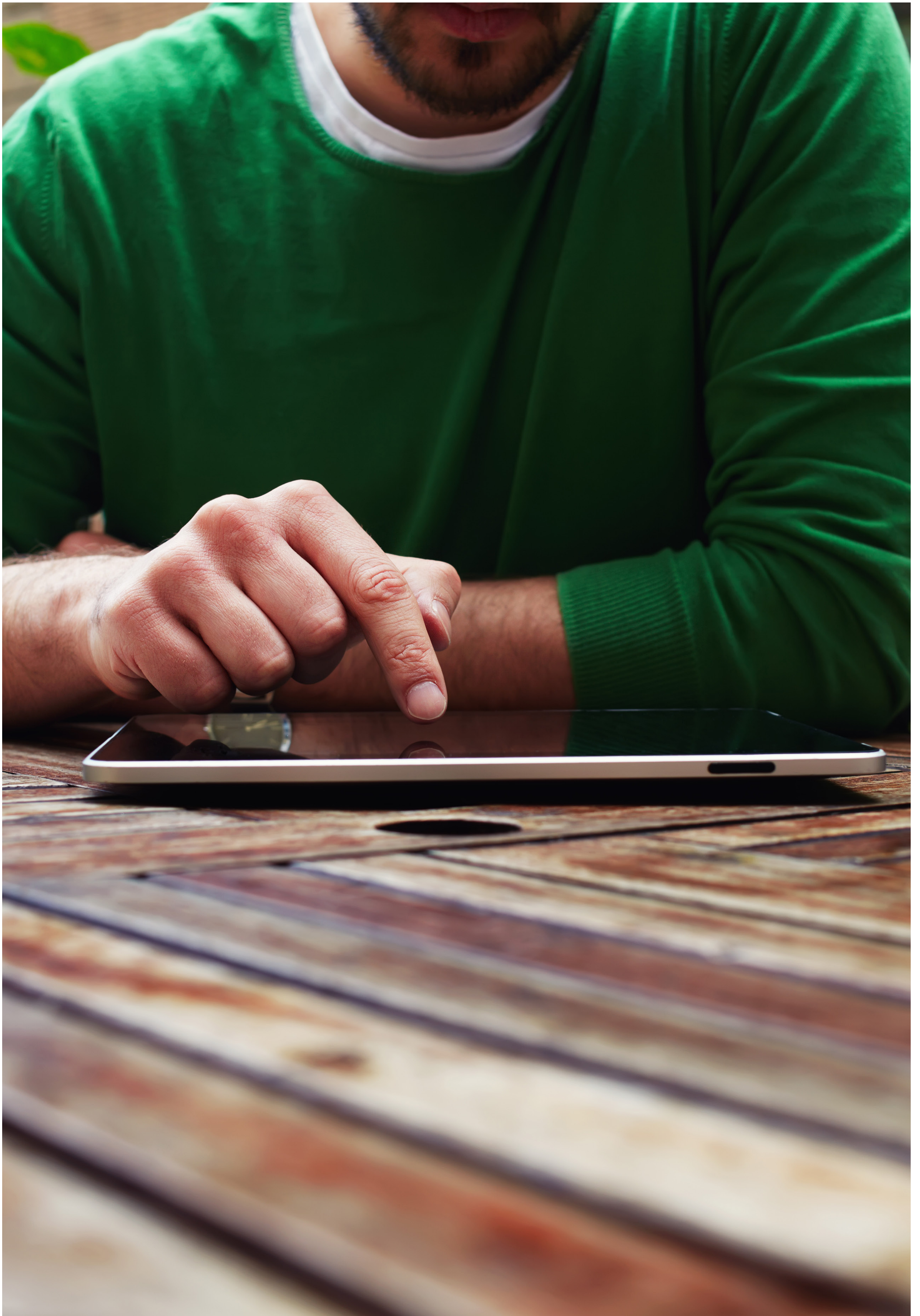
What steps have already been taken?

When the Commission launched its DSM strategy on 6 May 2015, the Commission's DG Competition started an e-commerce sector inquiry with the aim of gathering data on the functioning of e-commerce markets so as to identify possible restrictions or distortions of competition, in particular in relation to cross-border online trade. The sector inquiry involved information requests to a variety of actors in e-commerce markets throughout the EU both in relation to the online sales of consumer goods (such as electronics, clothing, shoes and sports equipment) as well as in relation to the online distribution of digital content. Both retailers and manufacturers/suppliers and right holders were questioned.

In parallel to this sector inquiry, DG Competition continued its investigation into the cross-border provision of Pay-TV services in the UK and Ireland, with the issuing of a Statement of Objections on 23 July 2015. In this case, DG Competition contested the use of contractual provisions preventing Sky UK from allowing EU consumers located elsewhere to access, via satellite or online, Pay-TV services available in the UK and Ireland. The investigation in this case is still on-going.

From September to December 2015, the Commission ran a public consultation on geo-blocking and other geographically based restrictions, in order to gather views and opinions on the restrictions faced by users, consumers and businesses when they access or provide information, shop or sell across borders in the European Union. The initial results of this consultation were announced on 27 January 2016 and a full report became available on 18 March 2016.

On 9 December 2015, the Commission published three legislative proposals, one of which specifically relates to the cross-border portability of online content services, thereby tackling at least one aspect of geo-blocking.



Initial findings of the e-commerce sector inquiry

On 18 March 2016, the Commission reported the initial findings of the sector inquiry.

The Commission reported that it had received responses from more than 1400 companies active in the distribution of consumer goods and digital content. According to the Commission, these responses show that geo-blocking is widespread throughout the EU.

As regards consumer goods, 38% of respondents indicated that they use geo-blocking. Refusal to deliver abroad is the main restriction affecting consumers from other Member States but refusal to accept foreign payment methods, and, to a lesser extent, re-routing and website access blocks are also used. While a majority of such geo-blocking results from unilateral business decisions of retailers, 12% of retailers reported contractual restrictions to sell across borders.

As regards digital content, geo-blocking is applied by the majority of online digital content providers participating in the inquiry (68%) and, according to the Commission, appears to be largely based on contractual restrictions, with 59% of respondents indicating that they are contractually required by right holders to geo-block. The techniques used for geo-blocking are mainly the user's internet protocol (IP) address that identifies and gives the location of a computer/smartphone. There appear to be significant differences in both the extent to which geo-blocking of online digital content services takes place in different Member States, and the extent to which different types of operators implement geo-blocking in relation to different categories of digital content.

Next steps

The Commission has stated that a more detailed analysis of the findings from the sector inquiry will be presented in a preliminary report which the Commission plans to publish for public consultation in mid-2016. The final report is scheduled for the first quarter of 2017.

By May 2016, the Commission furthermore intends to issue another legislative package to address what it sees as unjustified barriers to cross-border e-commerce.

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Judgments of the ECJ could limit the scope of information requests

On 10 March 2016, the Court of Justice of the European Union (*"ECJ"*) issued judgements1 on appeals by four cement companies by which it annulled a European Commission (*"Commission"*) decision relating to requests for information directed at cement manufacturers.

These judgments provide useful guidance on the duty of the European Commission to issue concise information requests and more broadly on the duty of the EU institutions to take particular care when drafting legal acts.

Background to the ECJ judgments

In November 2008 and September 2009, the Commission carried out inspections at the premises of a number of companies active in the cement industry which were followed by the sending of several requests for information between September 2009 and April 2010. In December 2010, the Commission notified its decision to initiate proceedings against several companies active in the cement industry for suspected infringements of Article 101 TFEU ("Opening Decision").

On 30 March 2011, the Commission adopted a formal decision under Article 18(3) of Regulation 1/2003 issuing a questionnaire ("RFI Decision"). Several companies, including German company Heidelberg Cement, brought actions for annulment of this decision for infringement of Article 18 of Regulation No 1/2003, notably for infringement of the principle of proportionality and a breach of its rights of defence. These actions were dismissed by the General Court which confirmed the lawfulness of the requests for information sent by the Commission to the cement producers.

Four of the cement companies in question appealed the General Court's judgments. While the appellants in these cases each put forward a number of arguments, the ECJ annulled the Commission decision in each case based only on one allegation brought by all four appellants –the General Court erred in stating that the Commission's contested decision contained an adequate statement of reasons.

The "duty to state specific reasons" is fundamental

Article 296 TFEU provides that legal acts from the institutions *"shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"*. The ECJ notes that this Article sets a general duty of the EU institutions to *"disclose clearly and unequivocally"* their reasoning when adopting such legal acts.

More specifically, regarding a decision of the Commission requesting information, Article 18(3) of Regulation No 1/2003 specifies that such a decision must include the legal basis and purpose of the request, specify what information is required, fix a time-limit and mention the penalties that may be imposed in case the company does not provide the necessary information.

The ECJ recalled that this obligation to state specific reasons is *"a fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence"*[2].

This is in line with the traditional case-law of the ECJ rendered with regard to inspections decisions[3], most recently in the Deutsche Bahn judgment[4].

1 Case C-247/14 P - HeidelbergCement v. European Commission (ECLI:EU:C:2016:149), Case C-248/14 P - Schwenk Zement KG v European Commission (ECLI:EU:C:2016:150), Case C-267/14 P - Buzzi Unicem SpA v European Commission (ECLI:EU:C:2016:151) and Case C-268/14 P - Italmobiliare SpA v European Commission (ECLI:EU:C:2016:152), judgments of 10 March 2016 and ECJ press release 27/16.

A two-step assessment: wording and context of the request for information

The assessment as to whether the statement of reasons meets the requirements of Article 296 TFEU is conducted with regard to its wording but also to its context and to all the legal rules governing the matter in question. In the present case, the ECJ clearly conducted a two-step analysis.

First, it assessed the clarity of the wording of the request for information itself and noted that the decision only set out an *"excessively brief statement of reasons which is vague and generic, having regard in particular to the considerable length of the questionnaire"*[5].

Secondly, it reviewed the context in which the RFI decision was rendered. It noted that (a) the infringement alleged in the Opening Decision was expressed in particularly succinct, vague and generic manner, (b) the list of products detailed in that decision was not exhaustive, and (c) there was a mismatch between the geographical scope referenced in the RFI decision (EU, EEA territory) and in the Opening Decision (specific list of EU countries).

Furthermore, on the importance of the context, the ECJ makes a distinction according to the timing at which the legal act is rendered during the investigation. The ECJ acknowledges that it is not necessary *"in a decision ordering an inspection, to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were allegedly committed, the Court justified that finding by the fact that inspections take place at the beginning of an investigation, at a time when precise information is not yet available to the Commission"*[6]. It follows that a request or related decision must not be *"excessively succinct, vague and generic"* but, in tackling this issue, the ECJ put emphasis on whether the Commission already has information that would allow *"it to present more precisely the suspicions of infringement by the companies involved"*[7] – specifically here where the decision is issued two years after the initial inspections took place.

Ultimately here the ECJ concluded that the statement of reasons for the Commission decision did not meet the requisite legal standards, set aside the judgments of the General Court and annulled the Commission's contested decision.

The impact in practice?

Through its judgments, the ECJ is sending a clear message that the Commission must ensure its information requests are focussed and specific.

Both the ECJ and Advocate General Wahl have previously criticised the Commission for what were perceived "fishing expeditions"[8], where the Commission uses a suspicion of an infringement of EU competition law to justify a request for all possible information that could be evidence of any infringement, even unrelated to that which is suspected. Where previous statements were aimed at the Commission's conduct on investigations generally, the judgments in these cement appeals clearly bring information requests and related decisions within the remit of this criticism.

Following these judgments, it is likely the Commission will need to ensure that, when it issues both information requests and related decisions, the questions asked and justifications given are sufficiently specific to allow the addressee to understand the necessity of the information requested in the context of the investigation at hand. If the Commission does not sufficiently justify its request, or the information requested can be seen to go beyond that required in respect of the suspected infringement, the request or decision may be subject to challenge on the above basis.

These judgments will be a welcome step towards clarity for companies in understanding the scope of their obligations under information requests and not needing to provide onerously large, irrelevant or disproportionate amounts of information to the Commission on request. The impact will clearly affect requests for information in cartel or other investigations, but will likely also have an effect on the relevance of information requests in merger control proceedings.

From the Commission's perspective however, this could significantly limit its ability to pursue ex officio investigations where it has not already been provided with relevant or substantive information by a whistle blower. While the ECJ acknowledged that the examination of what is sufficiently specific and detailed to adequately state the reasons for the request must be tied into the information available to the Commission at the time, its judgments here will limit the Commission's ability to search deep and wide in companies' information to find any substantive evidence where none has been initially provided.

The shortcoming of these judgments in practice is in their ruling only on the argument of an inadequate statement of reasons and not further tackling the other arguments raised by the parties against the Commission's information request policies. Such arguments included criticisms of the format of the information requested, the proportionality of the time-limits set in the contested decision, the vagueness of the questions themselves and arguments relating to the right to avoid self-incrimination. It remains to be seen how the ECJ may treat such arguments were they to arise again in future cases, seemingly given its current stance in limiting the Commission's investigatory powers.

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Hong Kong's first antitrust judgment since the new competition regime's entry into force

On 29 January 2016, Hong Kong's Court of First Instance quashed a 2013 decision ("*Decision*") by the Communications Authority ("*CA*") – upheld by the Chief Executive In Council ("*CEIC*") – against Television Broadcasters ("*TVB*"), primarily on the grounds that the CA and CEIC are inherently political entities lacking objective impartiality as decision makers due to their concurrent policy, advisory and executive roles.

While the Decision was ultimately set aside on constitutional grounds, as the CA and CEIC were not found to be an independent and impartial tribunal, the Honourable Justice Godfrey Lam of the Court of First Instance upheld most of the competition analysis by the CA and confirmed that TVB's practices were anti-competitive. As the first President of the Competition Tribunal under Hong Kong's new competition regime, Justice Lam's judgment provides considerable insight as to how future competition cases might be interpreted in Hong Kong.

September 2013 Decision

In September 2013, the CA found that TVB had violated the antitrust provisions of the Broadcasting Ordinance, in that the station had imposed certain restrictions with their artistes and singers with the purpose and effect of restricting or distorting competition in the Hong Kong television programme service market ("downstream market"). The restrictions included the:

- "no promotion policy" which prohibited TVB's contractual artistes from appearing in promotional activities of other local television stations, even if they starred in the production promoted
- "no original voice policy" which prohibited TVB's contractual artistes' original voice from being used in productions featuring their images broadcasted by other local or overseas television stations
- "no Cantonese policy" whereby artistes on contracts with TVB were prohibited from speaking Cantonese in programmes of other television stations in Hong Kong
- "no-obligation-to-use-clause" whereby TVB was not under an obligation to use a contracted artiste.

As a result of the above, the CA found that TVB had imposed exclusivity on singers and artistes. Due to the "no-obligation-to-use-clause," TVB was not bound to make any actual use of an artiste's services and did not in fact fully engage significant numbers of artistes and singers it contracted with. This enabled TVB to "warehouse" them at low cost. The CA found that the above provisions and policies had the effect of foreclosing rivals' access to an essential input for television programme production. Such foreclosure was found to produce significant harm on television viewers as end consumers by causing a deterioration of quality of rivals' programme offerings. The CA imposed a HK$ 900,000 penalty on TVB.

Despite the ability for the artistes or singers to seek consent prior to appearing on or providing services to other television stations in Hong Kong, in reality, the artistes and singers considered requesting TVB's consent to be futile or feared that seeking consent would be detrimental to their careers.

Court of First Instance's 2016 judgment

The framework for competition analysis to be applied was set out in the Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance, which were applicable to the telecommunications industry prior to the Competition Ordinance coming into force in December 2015. It applies a sequential methodology comprising three broad stages:

- defining the relevant market
- assessing market power
- identifying an anti-competitive purpose or effect in the relevant market.

Justice Lam considered the appropriate standard of proof is the balance of probabilities.

Market definition

While TVB agreed with the CA's definition of the downstream market as the "all TV viewing market," it contended that the CA erred in failing to define the relevant upstream market since the allegation was that conduct in such market impaired competition in the downstream market. TVB wanted to include in the definition of upstream market new or aspiring artistes and singers, and artistes not currently contracted with Hong Kong television broadcasters.

However, the judge held that the central focus remains on evaluating whether the contested conduct has an anti-competitive effect in a particular relevant market – in this case, the downstream market. It is not essential to formally define the upstream market in every case where input foreclosure is the underlying theory of harm, nor is there a general mandatory requirement in competition law to carry out a formal market definition exercise. Further, by applying a substitutability analysis to determine the size of the available pool of talent for producers of TV programmes in Hong Kong, it was unlikely that a local broadcaster could rely significantly on new artistes or high value artistes not under contract with any TV broadcasters to participate in entertainment programmes to drive rating and advertising revenue, as it was found on the evidence that it takes time to nurture new talents.

Market power

Justice Lam rejected that the proper assessment of market power needed to be based on revenue. He remarked that assessing market power depends on the nature of the competition being studied. For broadcasters, this was best reflected in their share of viewership, since both free to air ("FTA") and pay TV broadcasters were found to compete with each other to maximise viewership – the former to attract higher advertising revenue, and the latter to attract subscription fees.

The Broadcasting Ordinance defines dominance in terms of the ability "to act without significant competitive restraint from its competitors and customers." Thus, Justice Lam agreed that the relevant test is whether TVB was able to behave independently of its rivals and ultimately consumers, either by profitably raising prices or, in a FTA context, profitably reducing production cost. This is in line with international practices and is also the test favoured by the Hong Kong Competition Commission in its guidelines. If a broadcaster can reduce the quality of its programming without suffering a significant drop in viewership, this would be an indication of the extent of its market power. On the evidence, 40% of all households in 2009 did not have a pay TV subscription. They would not necessarily respond to a small drop in quality of TVB's programmes by switching to pay TV given cost and other considerations.

The CA also based its finding of market power on other factors including:

- the fact that TVB's market share was significantly higher than its rivals'
- high barriers to entry and exit from the market
- the absence of any real countervailing buyer or supplier power.

Proportionality of remedies

Justice Lam held that the CA had imposed disproportionate remedies that went beyond what was necessary to redress the anti-competitive harm found. The judge held that there was no reason for requiring TVB to abandon all restrictive clauses and policies in relation to all artistes on all types of contracts – i.e., serial-based, minimum one-show or singer contracts – when releasing artistes on the minimum one-show commitment contracts could already bring the infringing system to an end.

Conclusions

This case is of considerable significance to competition enforcement in Hong Kong, as it is the first case decided by the President of Hong Kong's new Competition Tribunal.

While the Decision was struck out on constitutional grounds, Justice Lam upheld the entirety of the competition analysis by the CA – except the proportionality of the remedies – and confirmed that TVB's practices were anti-competitive. The judge found that the "no original voice policy" rendered rivals' programmes less appealing to TV viewers, and imposed a direct cost on rivals by requiring them to dub acquired programmes. Similarly, the "no promotion policy" exacted a direct cost on rivals in the form of extra advertising and promotional expenses incurred to promote a drama series. The "no cantonese policy" also reduced the quality of the interviews with singers on rival TV stations, thus impairing rivals' ability to compete with TVB. On the balance of probabilities, restricting artistes' services had a high potential of causing harm to consumers by resulting in a deterioration of quality of rivals' self-produced TV programmes for which artistes services are a key input.

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Amending China's Anti-Unfair Competition Law – two steps forward, one step backward?

Introduction

On 25 February 2016, the Legislative Affairs Office of the State Council – China's "cabinet" – published a draft of the proposed amendments to the Anti-Unfair Competition Law ("Draft") and invited comments by stakeholders.

The Anti-Unfair Competition Law ("AUCL") contains a potpourri of provisions aiming at protecting fair competition in the marketplace, covering a variety of legal fields such as intellectual property and commercial bribery, as well as antitrust. The AUCL was enacted back in 1993, at the very initial stages of China's economic reform under Deng Xiaoping. After more than 20 years of implementation, the market practice has evolved and new rules – for example, the Trademark Law and the Anti-Monopoly Law ("AML") – have been enacted to regulate some of the areas covered in the AUCL.

The Draft proposes an important overhaul of the current law, especially in the fields of antitrust, intellectual property and anti-bribery. Generally speaking, it aims to bring the AUCL more in line with recent domestic legislation and more in sync with international legal standards, and to codify existing case law and practice. In the antitrust arena, the Draft promises to bring substantial changes, as set forth below.

Alignment with the AML

As mentioned, the AUCL was enacted in 1993, long before the enactment in 2007 of the AML, which is generally more in line with up-to-date international antitrust practices. It is against this background that the Draft proposes to delete a few antitrust provisions from the AUCL to avoid overlap and inconsistency with the AML.

In particular, although there are subtle differences in the exact text of the laws, both the AUCL and the AML prohibit predatory pricing, tying and the imposition of unreasonable transaction conditions. But, unlike the AML, the AUCL does not require demonstration that the company at issue has a dominant position for such types of conduct to be illegal. Hence, at this point in time, predatory pricing, tying and the imposition of unreasonable conditions can be illegal under the AUCL for any company, irrespective of its market position. By deleting the AUCL provisions altogether, the Draft proposes to give the AML's text full meaning as the only applicable legal framework for these types of conduct.

The AUCL also singles out public utilities and other monopolies – mainly state-owned enterprises – by prohibiting them from engaging in exclusive dealing and tying. The background of this prohibition is that, back in 1993, the radical transformation of the Chinese economy within the framework of Deng Xiaoping's "reform and opening-up policy" was going ahead full steam. At that moment in China's reform process, the economy was largely dominated by state-owned companies, and specific regulation of their behaviour seemed appropriate.

In today's China, private enterprises play a much more important role than in 1993, and the legislator today may feel that it is no longer necessary to single out public utilities and state monopolies, as the AML should apply to companies irrespective of their ownership. As a result, the Draft also proposes to delete this provision from the AUCL.

Another set of overlapping provisions between the AUCL and the AML is in the area of "administrative monopoly" conduct, a term used in China to describe government's anti-competitive interference in the marketplace.

The current AUCL contains a relatively high-level provision prohibiting government bodies and assimilated agencies from abusing administrative powers to restrict competition, such as appointing exclusive suppliers or discriminating against non-local companies.

In turn, the AML contains an entire chapter on "administrative monopoly," outlawing specific manifestations in quite some detail. As with the other above-mentioned provisions, the Draft resolves the discrepancies across laws by proposing to delete the AUCL provision on "administrative monopoly," leaving the field to the more specialized provisions of the AML.

"Relatively advantageous position"

While the above-mentioned deletions may ensure a higher degree of consistency between the AUCL and the AML and may thereby reduce uncertainty for businesses, Article 6 of the Draft goes into the opposite direction.

Essentially, Article 6 attempts to address situations where a company is not dominant, but has a "relatively advantageous position" vis-a-vis counterparties in the course of trade, and engages in certain activities deemed anti-competitive or unfair.

The threshold for the "relatively advantageous position" is clearly meant to be lower than that of "dominance." The Draft proposes to look at factors such as financial strength, technology, market access, sales channel or raw materials procurement etc. to check if they create a relationship of dependence on the company by its trading partners. If so, the company may be deemed to have a "relatively advantageous position."

Similar to the AML's abuse of dominance rules, the Draft does not prohibit companies from having or obtaining a "relatively advantageous position" as such. Only certain abuses of such position can be illegal.

According to Article 6, an abuse may take the shape of restrictions on the trading partners' business dealings with third parties; exclusive purchasing; abusive charges on, or requiring unreasonable economic benefits from, trading partners; the imposition of unreasonable conditions; etc.

The "relatively advantageous position" concept is somewhat – though not completely – new in China. In the past, there were a limited number of similar rules in other pieces of legislation such as the Administrative Measures for Fair Transactions between Retailers and Suppliers.

Internationally, the "relatively advantageous position" concept is not entirely new either. In fact, Article 6 in the proposed AUCL amendment is seemingly drawing heavily on German – and, to a lesser extent – Japanese and Korean competition laws.

If the Draft's proposals remain in the final amendment of the AUCL to be enacted and are enforced vigorously in practice, the impact of Article 6 on companies doing business in or with China could be far-reaching. While the "relatively advantageous position" concept may potentially be beneficial to small(er) companies, it risks creating a new level of rather opaque compliance obligations on large(r) companies.

Conclusions

The Draft may be viewed as an attempt by the Chinese government to modernize Chinese unfair competition rules. From an antitrust perspective, the goal to seek alignment between the AUCL and the AML is surely laudable, and the abrogation of prohibitions of predatory pricing, tying and imposition of unreasonable conditions by companies irrespective of their market position appears to make sense.

At the same the time, the introduction of the new concept of a "relatively advantageous position" may add significant compliance obligations for companies and hence risks significantly reducing the benefits of the AUCL reform.

Going forward, the State Council has already collected stakeholder feedback on the Draft. As a next step, the Draft may either be further amended (and potentially circulated for comment again) or be directly sent to the Standing Committee of the National People's Congress for enactment.

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FAQs – Hong Kong Competition Commission responds to common concerns

New Frequently Asked Questions (*FAQs)* have just been released by the Hong Kong Competition Commission *(HKCC)*. The FAQs do not change the laws that came into full force on 14 December 2015, but they do provide businesses with responses and a better understanding of the HKCC's position regarding common concerns on how to comply with the new Competition Ordinance *(CO)*.

The key FAQs you need to know are set out in a snapshot below:

Is the HKCC's role to monitor prices? NO

– **The CO does not seek to regulate prices, nor is HKCC's role an enforcement authority for price regulation.** However, the HKCC is initiating a study into the Hong Kong auto-fuel markets in response to public concerns on fuel charges which have been said to be "quick to rise and slow to drop".

– **As long as businesses make their pricing decisions independently, such decisions** "will almost never raise competition concerns". Except, if a business with substantial market power independently decides to price below cost (i.e. engages in predatory pricing) to drive out competitors then this may raise a competition concern.

– **In general, the HKCC welcomes businesses charging lower prices** based on competition on the merits.

If prices are the same everywhere, does this mean there's a breach? NO

– **Just because businesses have the same prices does not necessarily mean there is evidence of price-fixing or a breach** of the CO. Market conditions might mean that prices naturally gravitate towards the same price (also called "parallel pricing", and this does not require any arrangements between competitors).

Are mere recommendations on prices acceptable? YES

– **Identifying retail prices as "suggested" or "recommended"** are unlikely to raise competition concerns so long as they are merely recommendations, and retailers are free adjust their prices upwards or downwards to compete with each other. Mere price recommendations are recognised as common practice for many manufacturers and distributors.

– **But be warned, a mere recommended retail price must not be coupled with other measures** (e.g. penalties or a withdrawal of incentives) that effectively requires a retailer to follow the recommendation. Such practice may not be a "true" recommended price and could breach the CO. The HKCC will look to the substance to see if it is a true recommendation.

– **If you are a manufacturer or distributor, and you require a retailer to observe a fixed or minimum resale price**, this could be classified as "resale price maintenance" in breach of the CO.

Should I always use a tender process for goods or services contracts? NO

– **Businesses are generally free to choose how they will contract for goods or services**, and whether or not a tender process is used to select a contractor does not, of itself, raise concerns under the CO.

– **But if you do use a tender to buy goods or services**, concerns in relation to tender procedures may be relevant if there is an indication that bidders who should be competing to win a tender have entered into an anti-competitive arrangement with each other. The CO does not provide that the customer tender must be conducted in a particular way.

Can I offer products in a bundle? DEPENDS

– **For small and medium enterprises**, tying and bundling practices are common commercial arrangements and generally they do not harm competition or breach the CO.

– **But if a business with substantial market power** engages in tying or bundling, this may breach the CO if it harms competition in Hong Kong (e.g. where the conduct results in anti-competitive foreclosure).

Can I appoint an exclusive distributor in Hong Kong to distribute goods? DEPENDS

- **Generally, if your exclusive distribution agreement (i) is unlikely to have an anti-competitive effect on competition in the relevant market; or (ii) has an applicable exemption or exclusion in the CO**, then such distribution agreement should not cause concerns under the CO. Harming competition in a relevant market is likely to occur if one of the parties to the agreement has market power and the agreement is likely to foreclose its rivals' access to the market. As the effects of exclusive agreements can vary considerably the HKCC is generally not in a position to provide further guidance in this regard.
- **But, even if an exclusive distribution agreement is considered to have anti-competitive effects**, the agreement may nonetheless benefit from the general exclusion for agreements 'enhancing the overall economic efficiency' under the CO provided the relevant conditions are met.

Can employment contracts have non-compete clauses? YES

- **A unilateral imposition by employers of non-compete obligations on employees is unlikely to harm competition** or breach the CO unless they are of an unduly long duration and/or relate to an expertise which is in very limited supply. This assumes that the imposition of the restriction is an independent decision of the employer.
- **But be warned, competitors sharing or agreeing on certain terms and conditions** of their employees' employment contracts is likely to harm competition and breach the CO.

I'm dealing with an 'exempt statutory body' – do competition laws still apply? YES

- **Businesses who are not exempt but engage in anti-competitive conduct in their dealings with statutory bodies are still subject to competition law**. A list of exempt statutory bodies can be found here in Annex A.
- **Exempt statutory bodies are still expected to adhere to the** 'spirit of competition rules'. In this regard, we note that the government plans to review the exemption for statutory bodies three years after the full commencement of the CO.

The FAQs serve to remind companies and individuals of the need to consider the implications of the CO and competition laws in conducting their businesses as well as the interaction of the CO with other laws, such as employment law.

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Chinese pharma company fined for refusal to supply downstream competitors

On 22 December 2015, the State Administration for Industry and Commerce ("SAIC") published the decision of its local branch in Chongqing ("Chongqing AIC") against pharma company Chongqing Qingyang Pharmaceutical Co., Ltd. ("Qingyang") for refusal to deal in breach of China's Anti-Monopoly Law ("AML").

The background

Qingyang is a manufacturer of both allopurinol active pharmaceutical ingredients ("API") and allopurinol drugs. Allopurinol API is an essential ingredient for the production of allopurinol drugs. Allopurinol drugs are used to treat gout, a type of arthritis disease.

Before September 2013, Qingyang used around 10% of its allopurinol API production to manufacture allopurinol drugs itself, while the remaining 90% were sold on the market to seven competing allopurinol drug manufacturers.

The conduct targeted in the antitrust enforcement action started in September 2013, when Qingyang entered into a five-year distribution arrangement with Xiangbaihe, a pharmaceuticals distributor. The agreement was to take effect from December 2013 when Xiangbaihe would become Qingyang's exclusive distributor in China. The agreement also stipulated that, during a "buffer period" from October to December 2013, Qingyang would not supply any allopurinol API to third parties without Xiangbaihe's approval.

As a result of the agreement with Xiangbaihe, Qingyang stopped supplying allopurinol drug manufacturers with allopurinol API from October 2013, until March 2014, and rejected various purchase orders. Instead, Qingyang ramped up its own production of allopurinol drugs, increasing its market share to close to 60%.

The investigation into Qingyang's activities started after the company itself approached the Chongqing AIC to check whether the practices are compliant with the AML. The Chongqing AIC found they were not.

The ruling

In its decision of 28 October 2015 – but which was only made public on 22 December – the Chongqing AIC held that Qingyang had committed an abuse of dominance by way of "refusing to deal." The refusal to deal consisted of Qingyang's refusal to supply allopurinol API, as an indispensable input, for the production of allopurinol drugs. In reaching that conclusion, the authority followed the standard steps in abuse of dominance cases: relevant market; dominance; abuse; justifications; and effects.

In terms of market definition, the authority conducted a relatively detailed analysis into the pharmacology and prices of allopurinol drugs and other drugs used in the treatment of gout, and found them not to be sufficiently substitutable with each other. Allopurinol API was found to be an indispensable input for the production of allopurinol drugs. As a result, the Chongqing AIC concluded that the Chinese allopurinol API market was the relevant market in this case. The dominance analysis of the authority showed that Qingyang did not have any domestic competitors, in part due to the lack of governmental authorization for the import of foreign allopurinol API. On the basis of a 100% market share and other factors, the Chongqing AIC found Qingyang to have a dominant position.

Analyzing Qingyang's conduct, the Chongqing AIC held that the company had abused its dominance in the upstream market (allopurinol API) to exclude competition in the downstream market (allopurinol drugs). During the six months of the contested conduct, four out of the seven competing allopurinol drug producers stopped production or switched to other products as a result of Qingyang's refusal to supply the required input. In contrast, Qingyang's downstream market share was estimated to rise from around 10% before the conduct to around 57% within one year after.

The authority also spent some time analyzing the actual effects of the abusive conduct, and held Qingyang's behavior to have caused significant harm to the market, the industry and customers. The regulators found that prices for allopurinol API had increased from 240/kg to 535/kg, and were eventually passed on to end customers purchasing allopurinol drugs.

As a result, the Chongqing AIC imposed a fine of approximately RMB 440,000 on Qingyang, representing 3% of the company's aggregate sales revenues in the upstream and downstream markets in 2013.

Impact

The Chongqing AIC's decision is important from several aspects. First, the pharma sector continues to be under spotlight for antitrust enforcement in China. In August 2015, another Chinese antitrust authority – the National Development and Reform Commission ("NDRC") – challenged the anti-competitive conduct by a local government body in Anhui in the course of the government drug procurement process (see here). Later on, in November 2015, NDRC took antitrust actions against similar conduct by government branches in Sichuan and Zhejiang.

From these developments it becomes clear that the pharma sector continues to be under close scrutiny by antitrust regulators. The background is, in part, that in May 2015 the Chinese government started to liberalize drug prices and may view antitrust as a tool to intervene in the event of unwanted price increases as the reform takes pace.

Second, the Qingyang case is the first published decision by SAIC or its local offices finding a refusal to deal in breach of the AML, and one of the very few refusal to deal decisions by antitrust authorities and courts in China more generally.

Refusal to deal is a hotly debated issue in antitrust circles, not least in the pharma industry with its extensive R&D efforts and intellectual property rights. The future will tell whether the Qingyang decision remains an isolated case, or herald a more frequent use by antitrust authorities of the AML's refusal to deal provision.

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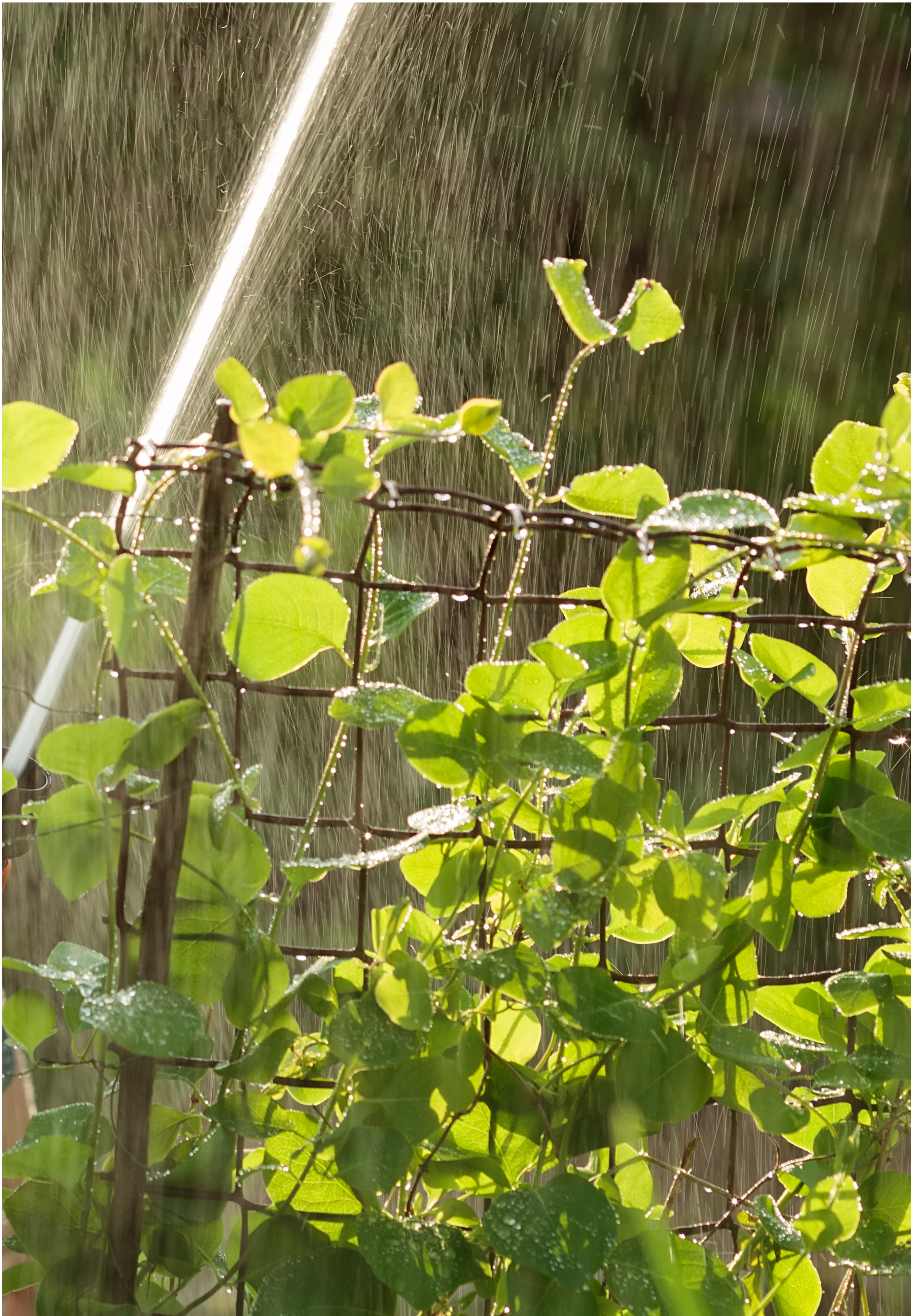

Belgian endives on the frontline for price fixing by farmers

Belgian endives are a divisive vegetable: their bitterness delights some but repulses others. And even amongst Belgian endive enthusiast you'll find some that prefer them raw – to maintain their crispness – while others like them cooked so that their bitterness comes out even more.

But Belgian endives are no longer the exclusive battleground of food aficionados: they will soon be served to the European Court of Justice following a request for preliminary ruling by the French Supreme Court.

The case which the French Supreme Court is analysing concerns what the French competition authorities described as a cartel between producers of Belgian endives, setting minimum prices and managing production volumes in order to maintain these prices. Such agreements, decisions and concerted practices between competitors are normally prohibited by Article 101 TFEU but the French Belgian endive producers have argued that the rules of the European Common Agricultural Policy (CAP) exempt them from this prohibition. The French competition authority rejected their arguments but, on appeal, the Paris Court of Appeal followed their reasoning, thereby annulling the fine the French competition authority had imposed. The French Supreme Court has now decided to raise the matter before the European Court of Justice.

To the dismay of some competition lawyers, the European Court of Justice has repeatedly held (see for example C-137/00 Milk Marque) that the objectives of the CAP take precedence over those in relation to competition policy. This does not mean that the CAP is a competition-free zone: according to the Court, the application of competition rules in the agricultural sector can be limited in a specific and targeted way but not excluded entirely. The Common Market Organisation (CMO) Regulations that have been adopted by the European Union in furtherance of the CAP have always foreseen exemptions from the competition rules in certain circumstances, but price fixing was not explicitly exempted.

The French Belgian endive producers argue that the CMO Regulations nevertheless foresee that the aims of producer organisations include "ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity"; "promoting concentration of supply" and "stabilizing producer prices". The producers argue that they engaged in the contested practices with these objectives of a producer organisation in mind and that therefore Article 101 TFEU should not apply to them.

The producers can expect stiff opposition before the Court of Justice, possibly including from other Member States (where similar arguments have been squarely rejected by the courts – see for example, the 20 March 2014 judgment of the Court of Rotterdam in the silver onion cartel case) and the European Commission. In its recent guidance on collective bargaining in the olive oil, beef and veal and arable crops sector, the Commission remains very close to the orthodoxy of EU competition law, despite the changes introduced in the latest CMO Regulation (Regulation 1308/2013) – not yet applicable to the endives case.

We will need to wait to see whether the judges' love or hatred of Belgian endives will make them favour farmers or dumping prices.

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Welcome

Lesley Morphet and Nkonzo Hlatshwayo

We welcome Lesley Morphet and Nkonzo Hlatshwayo who joined the firm on 1 March 2016 as partners in our Antitrust, Competition, & Economic Regulation Practice Area. Both were previously partners at Webber Wentzel.

Lesley Morphet is heading our competition practice in Johannesburg. She holds BA and LLB degrees from the University of Cape Town. Prior to her time at Webber Wentzel, Lesley was with Deneys Reitz for many years and headed their competition practice for 11 years.

She has been in practice for more than 25 years, advising on competition issues including merger notifications, prohibited practices, leniency applications, exemption applications and compliance across Africa since the inception of the current competition legislation in South Africa in 1999. Her extensive experience spans across a range of sectors, including mining, forestry, manufacturing, power and electricity, media, liquid fuels, aviation, banking and information technology.

Having been involved in many multi-jurisdictional mergers in Africa, she has considerable knowledge of the competition laws of many African countries.

Lesley has been recommended in Chambers Global, IFLR1000, Legal 500, and The International Who's Who for competition law and antitrust.

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Nkonzo Hlatshwayo holds BA and LLB degrees from the University of Swaziland, an LLM degree from Osgoode Hall Law School at York University in Canada, and a Certificate in Mergers and Acquisitions form the New York Institute of Finance. In addition, he has completed the Senior Executive Programme for Southern Africa at Harvard Business School and an internship at the US Department of Justice and Federal Trade Commission.

Nkonzo's focus is on general competition work (including transactional/M&A) in South Africa and a number of African jurisdictions. He represents parties in merger proceedings, complaint proceedings, intervention applications, leniency applications and cross-border proceedings. He also advises on competition law compliance and audits.

Previously, he served as a director in the Competition Board under the Department of Trade and Industry and later became the founding head of the Mergers & Acquisitions Division of the Competition Commission. He also served in a Deputy Commissioner capacity for two years. More recently he served as chairman of the Swaziland Competition Commission for 3½ years.

Nkonzo has been intimately involved in the development and evolution of competition law in the region. He has handled a number of regional competition matters before various competition authorities. Nkonzo was also a lecturer in law for a number of years, teaching company law, constitutional law and the law of property. He published a number of academic articles and co-authored a book on human rights.

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