Antitrust, Competition and Economic Regulation Quarterly Newsletter

Summer 2018

Contents

American Express and two-sided antitrust markets: coming to a network near you 4

A sign of things to come? CMA imposes first fine for breach of a 'hold separate' interim order 8

The Italian Competition Authority (AGCM) takes action against online sellers of dietary supplements for regulatory non-compliance resulting in misleading actions 10

"Single entity defense" under scrutiny in China 12

Competition Amendment Bill 14

UK Competition Appeal Tribunal overturns excessive pricing decision against Pfizer and Flynn 16

Good things don't always come in small packages for the European Commission: Advocate General Kokott delivers her Opinion on the blocked UPS/TNT deal 19

Digital competition policy on the move: Price algorithms in the German Monopolies Commission's spotlight – EU Commission launches public consultation process 21

A changing landscape? What AT&T/Time Warner means for future deals 23

Communications and competition: we've got the tools for the gigabit society 25

New UK foreign investment screening rules come into force 26

U.S. federal courts are not bound by a foreign government's submission when resolving conflicts between U.S. antitrust law and foreign law 28

American Express and two-sided antitrust markets: coming to a network near you

On 25 June the U.S. Supreme Court ruled in *Ohio v. American Express* that American Express *(Amex)* did not violate the federal antitrust laws by directing merchants not to "steer" cardholders to alternative credit cards as a condition for accepting American Express cards. In a groundbreaking decision, the Court held that analyzing the effect of the anti-steering rules on merchants alone was inappropriate, and that, instead, the combined effect of the rules on both merchants and cardholders should be analyzed in a two-sided "transaction platform" market. The decision likely will have broader implications far beyond the credit card industry on how to define (and evaluate effects) in markets where platforms or intermediaries connect groups of buyers and sellers.

Background

One way in which *Amex* differs from other credit card companies is that *Amex* charges merchants a higher fee in order to provide greater rewards and other benefits to cardholders. Merchants want access to *Amex* cardholders because they tend to be wealthier and spend more, but merchants also would prefer to process the transaction with a lower fee, so they steer buyers to other cards at the point of sale. To address these incentives, *Amex* created the anti-steering rules to prohibit merchants from steering *Amex* cardholders to lower cost cards at the point of sale.

In 2010, the U.S. Department of Justice (DOJ), joined by attorneys general of 18 states sued *Amex* alleging that *Amex*'s use of anti-steering rules violated Section 1 of the Sherman Act. The government argued that these provisions reduced competition among credit card companies that would otherwise have resulted in a reduction in the merchant fees that those companies charge to process transactions. American Express countered that the government failed to properly account for the effect of the anti-steering rules on cardholders, who benefit from increased cardholder rewards and other benefits. The dispute therefore centered on whether the government's evidence of increased merchant fees alone was sufficient to show harm to competition. In 2015, the district court ruled in favor of the government. A year later, the Second Circuit reversed, finding that the district court's analysis did not properly account for the effect of the rules on cardholders. Eleven states, led by Ohio, subsequently petitioned the Supreme Court to grant certiorari. Once the Supreme Court granted certiorari, the DOJ joined the states' efforts in opposing *Amex's* anti-steering provisions.

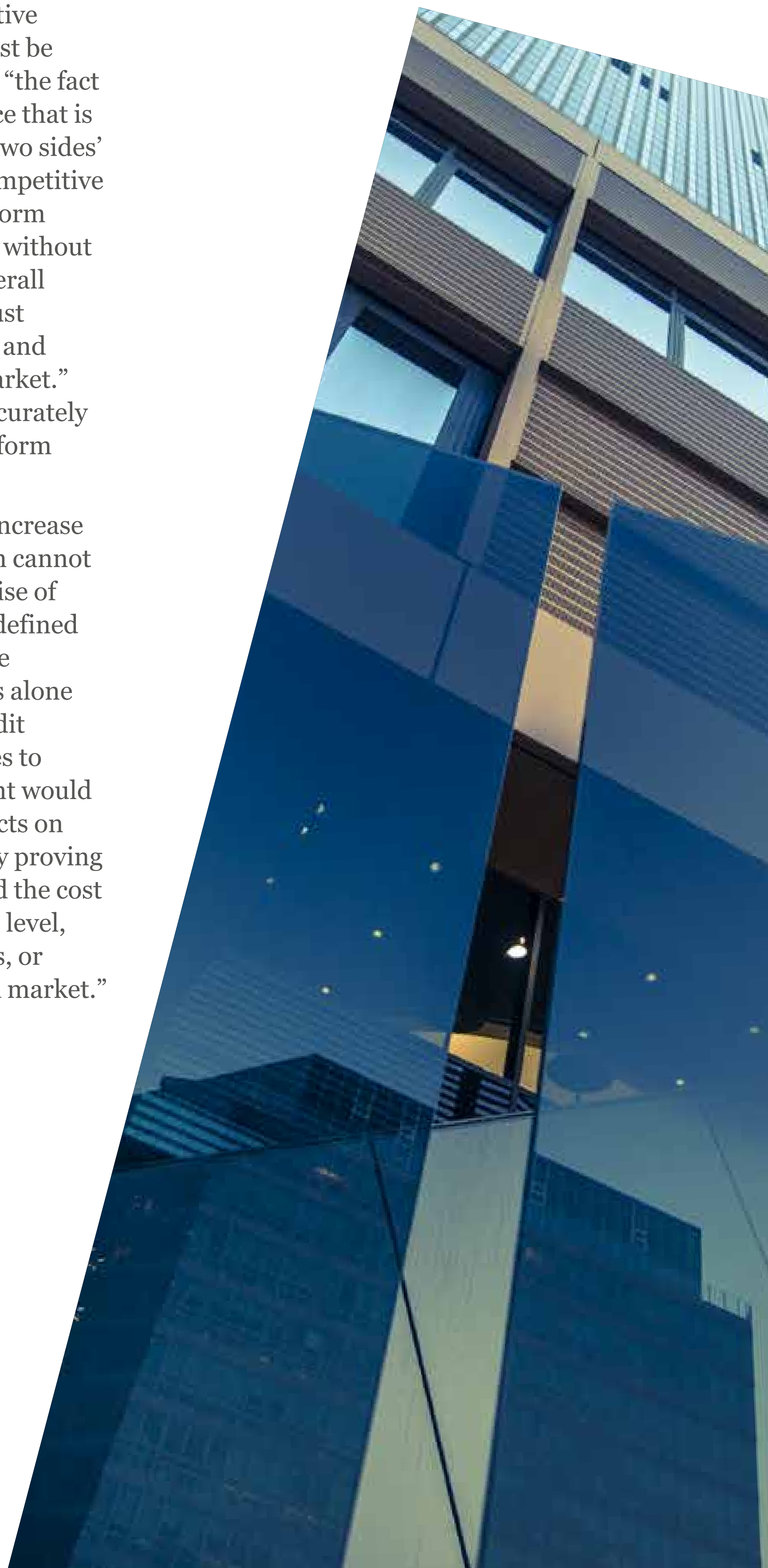
The Opinion

In a 5 to 4 decision authored by Justice Thomas, the Supreme Court affirmed the Second Circuit. The majority began by characterizing credit card services as a two-sided "transaction platform" market in which a company "offers different products or services to two different groups who both depend on the platform to intermediate between them" and in which the company "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. The majority explained that such markets are characterized by "indirect network effects," meaning that "the value of the services that the two-sided platform provides increases as the number of participants on both sides of the platform increases." With respect to the credit card market, for example, the method of payment becomes "more valuable to cardholders when more merchants accept it" and "more valuable to merchants when more cardholders use it."

The Court went on to explain why it is important to properly identify "transaction platform" markets. Noting that, "[s]ometimes indirect network effects require two-sided platforms to charge one side much more than the other," the Court said that "[t]he optimal price might require charging the side with more elastic demand a below-cost (or even negative) price." In other words, the Court held that a company may lawfully "subsidize" customers on side A with elastic demand by charging higher prices to customers on side B with inelastic demand.

The core of the Court's holding is that competitive effects on both cardholders and merchants must be evaluated together in a single relevant market: "the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit card market." The Court held that "competition cannot be accurately assessed by looking at only one side of the platform in isolation."

As the Court explained, "[e]vidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power." Because the market had to be defined to include both merchants and cardholders, the government's reliance on higher merchant fees alone "misses the mark because the product that credit card companies sell is transactions, not services to merchants." Instead, to prevail, the government would have had to "demonstrate anticompetitive effects on the two-sided credit card market as a whole" by proving that *Amex's* anti-steering provisions "increased the cost of credit card transactions above a competitive level, reduced the number of credit card transactions, or otherwise stifled competition in the credit card market."



The government had presented evidence that some percentage of *Amex's* merchant fee increases were not spent on cardholder rewards or other benefits. But the Court held that this evidence of an increase in the "net" price of transactions was insufficient standing alone because the government failed to provide evidence that such net prices were high relative to what would prevail in a competitive market. The Court also noted the lack of evidence of a reduction in output given that the number of credit card transactions overall grew by 30 percent between 2008 and 2013. And it acknowledged that Visa and MasterCard had constrained *Amex's* ability to raise merchant fees and had achieved broader merchant acceptance by charging lower fees. Because the government had not carried its prima facie burden of proof under the rule of reason to prove harm to competition, it was unnecessary to consider procompetitive benefits.

Implications

The *Amex* decision will have significant consequences in markets that could be characterized as two-sided transaction platforms. While the opinion provides some guidance, it leaves open many questions for lower courts to resolve, including:

When is market definition necessary? Plaintiffs often seek to rely on direct evidence of anticompetitive effects to demonstrate market power in lieu of formally defining a relevant market, based largely on language in *FTC v. Indiana Federation of Dentists*. However, in a footnote, the Court read that opinion narrowly as applying only to horizontal restraints and strongly suggested that market definition is required in every case involving a vertical restraint. In other words, plaintiffs may not rely on evidence of alleged actual anticompetitive effects to avoid market definition in vertical cases. This portion of the Court's ruling may have implications even beyond two-sided "transaction platform" markets.

What markets are "transaction platform" markets? The Court's opinion does not identify the industries that might be considered "transaction platforms." Instead, the Court focused on whether there are "indirect network effects," noting that, even if a platform can be characterized as two-sided, it "should be treated as one-sided when the impacts of indirect network effects and relative pricing in that market are minor." For example, even though newspapers connect readers and advertisers, the Court said that such markets should be considered "one sided" because the indirect network effects only work in one direction: while advertiser demand increases as the number of readers increases, readers are indifferent to the number of advertisers. While it remains unclear what markets might be considered two-sided "transaction platforms," companies in particular industries that may satisfy the Court's standard should carefully consider the implications of the *Amex* decision when analyzing antitrust issues. Potential examples include:

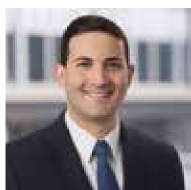
- **e-commerce**: user demand for online shopping increases as the number of consumer products featured on the operator's website increases
- **healthcare**: subscriber demand for health insurance increases as the number of providers in the insurer's network increases
- **media**: subscriber demand for a network increases as the amount of content on the network increases
- **ride-sharing**: user demand for a ride-sharing app increases as the number of drivers that participate on the app increases
- **travel**: user demand for online travel planning and comparative flight search services increases as the number of airlines selling tickets through the website increases.

How will courts analyze effects in "transaction platform" markets? The Court explained that evidence of price effects on one side of a two-sided market is not sufficient. Moreover, the Court held that it is not sufficient to show that price increases on one side of the market (e.g., merchant fee increases) were only partially passed through as price reductions on the other side of the market (e.g., cardholder rewards). Instead, the opinion suggests that a plaintiff must show that the challenged restriction resulted in a higher "net" price (or lower output) relative to what would prevail in a competitive market. The dissent (authored by Justice Breyer) voiced concerns with the burden this standard could impose on plaintiffs, noting that "to require actual proof of reduced output is often to require the impossible." The *Amex* decision certainly previews complex competitive effects analyses, and it remains to be seen what evidence lower courts will accept in balancing the costs and benefits of network effects in two-sided "transaction platform" markets.

If you have questions about what the *Amex* decision may mean for your industry or your company please contact us for further guidance.

Contacts

Justin Bernick
Partner, Washington, D.C.
T +1 202 637 5485
justin.bernick@hoganlovells.com



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

A sign of things to come? CMA imposes first fine for breach of a 'hold separate' interim order

On 11 June 2018 the Competition and Markets Authority fined Electro Rent £100,000 for breach of an interim order – the first such fine imposed by the CMA.

The CMA has increasingly been pursuing merging parties for procedural violations, using powers it acquired in 2014. For example, in November 2017 the CMA fined Hungryhouse £20,000 for failing to provide documents requested by the CMA during its review into Just Eat's acquisition of Hungryhouse.

Interim orders are a unique feature of the UK's voluntary merger control regime. After a brief explanation of when interim orders are used and the background to the penalty imposed on Electro Rent, we consider the key takeaways from this case, and what merging parties can learn from these going forward.

What is an interim order?

In the UK mergers can be completed without notification to the CMA. However, subject to its jurisdictional thresholds, the CMA has the power to 'call in' completed mergers for review.

Whilst it carries out its initial phase 1 review, the CMA will 'normally' put an initial enforcement order in place, which it will then replace with a slightly amended interim order if it refers the merger for a more in depth phase 2 review (referred to together as an "Order"). An Order prevents the parties from integrating their businesses or doing anything which might stop the CMA from 'unwinding' the merger should it find a competition problem. Where the parties want to do something which is restricted under the terms of the Order, they must seek a derogation from the CMA in advance.

Under the terms of an Order, parties must submit regular compliance statements to the CMA, confirming that they have complied with the Order and informing the CMA of any 'material developments' relating to the parties' businesses. This is in addition to the general obligation to actively keep the CMA informed of such material developments.

The CMA has the power to fine the parties up to five percent of their combined global turnover for breach of an Order.

Background

On 31 January 2017 Electro Rent acquired Microlease Inc. Electro Rent and Microlease both supply testing and measurement equipment across sectors such as telecommunications, aerospace and defence and IT. The CMA called the transaction in for review and imposed an Order on the parties on 1 February 2017.

Following its phase 1 review, on 19 October 2017 the CMA referred the merger for an in-depth phase 2 investigation. In November 2017, after being instructed to do so by the CMA, the parties appointed a monitoring trustee – an independent party appointed to monitor and report to the CMA on compliance with the Order.

On 5 February 2018 the CMA issued a notice of provisional findings, which stated that it had provisionally found that the merger had or may be expected to result in a substantial lessening of competition. It then discussed potential remedies with the parties, including the divestment of Electro Rent's UK branch.

Following the discussion about remedies, and whilst the Order was still in place, Electro Rent issued a Notice of Exercise Break Option (the "Notice") terminating the lease over its UK premises. The CMA became aware of the Notice 'independently' on 13 April 2018. On 20 April 2018 the CMA wrote to Electro Rent explaining that it considered this to be a breach of the Order and that it was considering imposing a penalty. On 21 May 2018 the CMA sent a provisional decision to Electro Rent and, after reviewing submissions made by Electro Rent in response, on 11 June 2018 it imposed a penalty of £100,000.

What are the key takeaways?

It is not sufficient to inform the monitoring trustee of planned changes to the business

Prior to issuing the Notice, Electro Rent informed the monitoring trustee of its plans, who advised Electro Rent that they may proceed to issue the Notice. The CMA found that this was not a reasonable excuse for Electro Rent failing to notify the CMA: CMA consent

is required for any activity potentially in breach of the Order and the onus is on the parties to seek such consent.

The CMA did however take the monitoring trustee's actions into account when determining the level of the fine – this was a 'significant factor in substantially reducing the level of penalty'.

Informing the CMA of possible breaches

Electro Rent did not bring the breach to the CMA's attention – the CMA found out about it of its own initiative and 'more significant potential prejudice was prevented only by action taken by the CMA once it became aware of the failure to comply'. The CMA took this into account in determining the level of fine.

Notably, Electro Rent did not mention the Notice in its compliance statements – this was a key factor which led to a penalty being imposed.

The breach may be more serious where it could impact on remedies

A potential remedy under consideration was the sale of Electro Rent's UK business, including the lease over its UK premises. The breach was considered to be particularly serious because of the potential impact on a suggested remedy package.

Although Electro Rent took steps to try to remedy the breach by entering into a new lease over the same premises, the new lease was on worse terms and was therefore less attractive to a potential purchaser of its UK business.

It is not clear how it would choose to deal with a more 'technical' breach which does not impact on its substantive assessment of the transaction. However, companies which are subject to an Order should be aware that the CMA has the power to impose a penalty for any breach of an Order, regardless of its impact.

Conclusion

Interpretation of the requirements of an Order can be difficult and nuanced. This decision highlights the importance of regularly seeking legal advice and communicating with the CMA whilst an Order is in force. In our experience, the CMA is pragmatic and responsive in response to questions of interpretation of an Order: a good line of communication with the CMA is essential and it may be advisable to discuss any planned changes with the CMA upfront, even where consent may not eventually be required.

This decision also highlights the CMA's willingness to use its enforcement powers in merger cases. It emphasised the important deterrent effect of its fining decision on Electro Rent and other businesses more widely. Orders are the CMA's tool to ensure it 'has the full range of remedy options open to it if required by the findings of the investigation': the CMA has shown that it is willing to vigorously protect this.

Contacts

Alice Wallace-Wright
Senior Associate, London
T +44 20 7296 5922
alice.wallace-wright@hoganlovells.com

Zoe Bartlett
Associate, London
T +44 20 7296 2159
zoe.bartlett@hoganlovells.com

The Italian Competition Authority (AGCM) takes action against online sellers of dietary supplements for regulatory non-compliance resulting in misleading actions

Further to a notice filed by European Specialist Sports Nutrition Alliance (ESSNA), the AGCM – the authority in charge of the enforcement of laws on deceptive advertising and deceptive commercial practices pursuant to the Italian Consumer Code, as well as the assessment of the correct use of nutrition or health claims – has started an investigation on the online sale of dietary supplements on the Italian market supposedly not complying with Italian regulatory provisions on dietary supplements, and resulting in misleading actions.

Labelling notification of dietary supplements

Article 10(1) of Legislative Decree No. 169 of 21 May 2004 (implementing the Directive (EC) 2002/46) stipulates that "*at the moment of first commercialisation of a [food supplement] the concerned enterprise shall inform the Ministry of Health by submitting a copy of the labelling used for such product*".

The notification must be performed by the food business operator responsible for the commercialisation in Italy of the related food supplement. More specifically, in light of Article 8(1) of Regulation (EU) No 1169/2011, "the food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market".

The AGCM decisions

Three decisions based on similar grounds have been published in the AGCM's bulletin No. 23 of 18 June 2018, delivered in three set of proceedings started against different online sellers of dietary supplements. The products were dietary supplements, mainly intended to enhance exercise and athletic performance, sold on the Italian market by online sellers located respectively in the United Kingdom (decision No. 27194), Slovenia (decision No. 27195), and Portugal (decision No. 27196).

While the circumstances of these cases were not identical, similar conclusions have however been drawn based on the lack of compliance with the regulation requiring the notification of the products' labelling, which was found in all instances, and the similar qualification of such behaviour by the AGCM as misleading advertising.

The AGCM found that the sellers put on the Italian market, selling online from abroad, dietary supplements whose labelling had not been notified to the Ministry of Health. The AGCM pointed out that the notification is a condition for lawful commercialisation of the food supplement on the Italian market, and that it is intended to enable the Ministry of Health's vigilance, preventing manufacturers from placing on the Italian market products that for their content and indication of use, as disclosed by the labelling, are not consistent with the Italian regulation on food supplements. The AGCM stated that, according to the claims showed on the investigated professionals' websites, the presentation of the products would "*have misled the consumers as to the actual features of the products, creating the wrong impression that the sale of the advertised products is lawful and is thus performed in full compliance with the applicable regulation. Therefore consumers may be prompted to choose the advertised dietary supplements on the basis of an erroneous understanding, so that their economic behaviour is adversely affected*".

However, a clear statement that the products were fully compliant with Italian law was put forward in only in one case, while for the others the same conclusion was drawn on the ground that the overall presentation and promotion of the products on the respective websites would have generated in the consumers an unjustified reliance on the products' regulatory compliance.

Comments

The number of dietary supplements – and the variety of uses for which they are promoted – has significantly increased in the last few years, as well as the direct number of purchases of said products through the web.

In this context, the AGCM's role is generally to ensure that consumers obtain accurate information concerning dietary supplements so that they can make informed decisions concerning these products. Indeed, the AGCM's enforcement action is mainly focused on detecting and removing false and misleading claims (e.g., weight loss supplements and products advertised

as guaranteeing immediate results or supplements which could cause serious health risks).

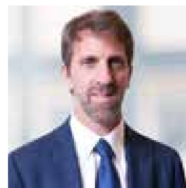
The cases at stake are quite different from the ones described above. Once a lack of regulatory compliance is found, the potential impact on consumer protection must be carefully considered for the specific consequence on a case by case basis. In the present proceedings, the AGCM was of the opinion that the lack of compliance would have inevitably misled the consumers on an essential feature of the products, even when no advertising claims were specifically made in that sense. It is reasonable that regulatory compliance with the requirements provided by the law for the commercialisation of a product is usually assumed by consumers. However, the conclusion that any lack of compliance automatically amounts to misleading advertising appears to be far-fetched. In the present case, indeed, it is disputable that there was an advertising claim specifically referring to notification in the labels of the product labels. Nor the mention of the ministerial notification is mandatory under Italian law; therefore the omission cannot be regarded as inevitably misleading, due to the lack of information on an "essential feature" of the products.

The AGCM decisions may be appealed before the Regional Administrative Court of Lazio and it would be of interest to observe the thoughts of the administrative judges in relation to the above mentioned issues.

Contacts

Sabrina Borocci
Partner, Milan
T +39 (02) 720252 384
sabrina.borocci@hoganlovells.com

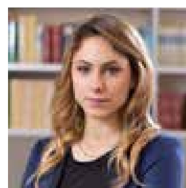
Luigi Mansani
Partner, Milan
T +39 (02) 720252 347
luigi.mansani@hoganlovells.com



Marco Berliri
Partner, Rome
T +39 (6) 675823 29
marco.berliri@hoganlovells.com

Riccardo Fruscalzo
Counsel, Milan
T +39 (02) 720252 327
riccardo.fruscalzo@hoganlovells.com

Eugenia Gambarara
Senior Associate, Milan
T +39 (06) 6758 2324
eugenia.gambarara@hoganlovells.com



Giulia Mariuz
Associate, Milan
T +39 (02) 720252313
giulia.mariuz@hoganlovells.com

“Single entity defense” under scrutiny in China

On 20 July 2018, the new Chinese antitrust authority – the State Administration for Market Regulation (SAMR) – published two decisions sanctioning two ship tallying companies in Shenzhen for market partitioning and price fixing.

Although the case is local and the decisions are short, the decisions have the potential to significantly impact business practices and structures in China. In particular, these decisions’ most significant point is SAMR’s rejection to apply the “single entity defense” to 50:50% joint ventures. If the *Shenzhen Tally* decisions reflect the general thinking at SAMR, many companies with 50:50% joint ventures would need to re-assess whether antitrust rules apply between their affiliates. Given that foreign companies quite frequently resort to joint venture structures – be it due to regulatory requirements or to easier market access through local partners – the decisions may have an important impact on multinational companies doing business in China.

Background

According to SAMR’s decisions, two tallying service providers in the port of Shenzhen – China Ocean Shipping Tally Shenzhen and China United Tally (Shenzhen) – had engaged in anti-competitive practices from May 2013 to August 2016.

Tallying service providers count the number of cargo pieces loaded onto or unloaded from a ship to prevent disputes between the shipper and the carrier. For a long time, there was only one state-owned tallying service provider in China – China Ocean Shipping Tally Company. In 2002, the Chinese government introduced the second tallying service provider – China United Tally Company Limited. The two companies involved in the *Shenzhen Tally* case are affiliates of these two companies. In 2015, the government further relaxed regulation and started to allow more players to enter the tallying service market.

In the current case, the collusive practices included a market partitioning agreement whereby each of the two operators would have the right to a 50% market share. When one of the operators reached its 50% market share, it would hike the prices for additional customers so much as to drive them to the other operator. The two companies also had a mechanism of settling revenues received in excess of the 50% market share between them. The two companies stopped the collusive practices after a third tallying service provider entered the Shenzhen port in August 2016.

In addition, the two companies collectively raised the prices of tallying services.

In November 2017, the antitrust unit at the National Development and Reform Commission (**NDRC**) – one of the predecessors of SAMR’s antitrust body/ies – started an investigation into the companies’ practices. After receiving the sheet of charges from SAMR, the companies presented their defenses in May 2018. SAMR adopted its final decisions on 9 July 2018 and published the decisions 11 days later.

“Single entity defense”

One of the companies’ main line of defense arguments was that the cartel provision in the Anti-Monopoly Law (**AML**) did not apply, as the companies were part of the same group (called “single entity defense” in other jurisdictions).

China Merchants Logistics held 50% shares in both companies. Regarding the remaining shareholders, there were differences between the two companies: China United Tally (Shenzhen) only had one other shareholder owning the remaining 50% of shares, while China Ocean Shipping Tally Shenzhen had two other shareholders with 29% and 21% of shares.

However, SAMR dismissed the “single entity defense” argument, putting forward three reasons:

– While China Merchants Logistics held a 50% shareholding in each of the companies, it only held a “relative controlling position” in one of them (where the other two shareholders had 29% and 21%), not in the other (where the other shareholder held 50%)

– From the operative perspective, the two companies were run independently of each other, at least after the entry of the third tallying service provider

– Regulations issued in 2002 that formed the second tallying company were aimed at creating competition and limiting joint ownership in the tallying services area.

The new decisions suggest the single entity defense is not available to 50:50% joint ventures in the particular circumstances of this case. This is an important development, since there have been no provisions in the AML or its implementing rules which regulate the single entity defense (outside the merger control context).

The development does not come as a total surprise, since there had been some investigations by NDRC targeting affiliated companies. However, the two decisions in the *Shenzhen Tally* case represent the first detailed discussion by a Chinese antitrust authority on whether and how the single entity defense theory applies.

That said, the rejection of the single entity defense is arguably fact-specific to this case. For instance, the sectoral regulation at issue was aimed at opening up the tallying service market and introducing competition into the market, hence an anti-competitive agreement between the then only two players in Shenzhen port seems to run counter to that proposition.

In addition, an important reason for rejecting the single entity defense appears to have been that the two companies were run independently and might have created the impression of being in competition. This is consistent with a prior NDRC case targeting affiliated companies. In a way, the idea here is that where companies give the appearance of competing, they need to be actually doing so. Where 50:50% joint ventures use the brand of only one of the parent companies, there may arguably be no such appearance.

Government guidance

Another argument in the parties' defense was that the prices for tallying services were government-guided. SAMR dismissed this argument on the ground that any government guidance or intervention on pricing would still not allow for concertation between the companies. To the contrary, SAMR found that the companies needed to determine their market conduct independently.

The reasoning here resembles the EU case law, such as in the Deutsche Telekom case where the EU courts essentially ruled that companies are subject to antitrust law for those areas where they enjoy decision-making powers in an otherwise regulated area.

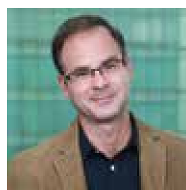
This finding may provide important guidance for future cases, as several sectors in China's economy are still relatively heavily regulated. The message here is that companies cannot hide behind sectoral regulation but need to assume their own antitrust responsibilities.

Takeaways

The *Shenzhen Tally* decisions are the outcome of a string of antitrust enforcement measures in the shipping sector. The driver behind those cases may well have been, at least at the beginning, the perceived need to lower export costs. More generally, the decisions show that SAMR, like its predecessor bodies, focuses on certain sectors to prioritize antitrust enforcement. Life sciences companies, for example, will have duly taken note.

Most importantly, the *Shenzhen Tally* decisions provide long-awaited guidance on the single entity defense in China, but perhaps not to the taste of many companies. Many market players including multinationals will need to re-assess what risks their governance structures including 50:50% joint ventures face under the Chinese antitrust rules following these decisions.

Contacts



Adrian Emch
Partner, Beijing
T +33 1 53 67 47 47
adrian.emch@hoganlovells.com

Rachel Xu
Associate, Beijing
T+33 1 53 67 47 47
rachel.xu@hoganlovells.com

Jiaming Zhang
Associate, Beijing
T+33 1 53 67 16 13
jiaming.zhang@hoganlovells.com

Competition Amendment Bill

On 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill (the Amendment Bill) for comment. Pursuant to input from various interested parties an updated version of the Amendment Bill was tabled in Parliament on 11 July 2018.

The Amendment Bill seeks among others to address the issue of economic concentration and to drive transformation of the South African economy, as well as to strengthen the provisions of the Competition Act (Act) relating to prohibited practices.

Changes introduced by the Amendment Bill include the following:

- Importantly, the Amendment Bill does away with the so-called "yellow card", which allowed for penalties not to be imposed for certain first time offences. Going forward, parties found to have contravened any of the prohibited practice provisions of the Act face the imposition of a penalty of up to 10% of turnover. Repeat offenders face a penalty of up to 25% of turnover. In determining the appropriate penalty, the turnover of parent entities may be taken into account.
- The Bill stipulates that the Commission should publish guidelines regarding the application of the sections regarding horizontal and vertical prohibited practices.
- The abuse of dominance provisions have been amended to include concepts developed from case law regarding predatory and excessive pricing and margin squeeze. The provisions have further been amended to include abuses by firms who are dominant customers. The price discrimination provisions have been amended with the objective of making it easier for smaller firms to sustain a complaint against a dominant firm.
- There are amendments to the exemption provisions to enhance the objectives of transformation and participation of small and medium sized businesses in the economy, including enabling the Minister to exempt agreements or practices to give effect to the purposes of the Act. Procedurally, a one-year time limit has been introduced within which the Commission must decide whether to grant or refuse an exemption application.
- The merger provisions have been amended to introduce new factors to be considered in the assessment of mergers between firms, including cross-ownerships and cross-directorships between parties to a merger, and importantly, any other mergers that a party to a merger has undertaken for a specific period. There are also amendments to clarify the importance of public interest provisions in the assessment process, and to bring those provisions in line with the objectives of transformation and deconcentration in the economy.
- An important addition relates to foreign entities making acquisitions. It is proposed that a Committee be constituted to consider whether such proposed acquisitions affect South Africa's national security interests, and this Committee may prohibit such mergers.
- There are amendments that seek to enhance the market inquiry process to include measures to address concentration, transformation and the promotion of small and medium businesses. The complex monopoly provisions (which have never been implemented) have been deleted, although some concepts have been carried through into the market enquiry provisions. The powers of the Commission are expanded and include the ability to order divestiture.
- The Amendment Bill introduces the concept of impact studies, enabling the Commission to assess the impact of previous decisions taken by the Competition Appeal Court, the Competition Tribunal and the Commission themselves.

The Minister has indicated that he anticipates the parliamentary process for considering the legislation to be concluded before the end of the year.

Contacts

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

Nkonzo Hlatshwayo
Partner, Johannesburg
T +27 (11) 286 6922
nkonzo.hlatshwayo@hoganlovells.com

UK Competition Appeal Tribunal overturns excessive pricing decision against Pfizer and Flynn

On 7 June 2018 the Competition Appeal Tribunal (**"CAT"**) rejected the decision by the Competition and Markets Authority (**"CMA"**) to fine drug makers Pfizer Limited and Pfizer Inc. (together **"Pfizer"**) and Flynn Pharma Limited and Flynn Pharma Holdings Limited (together **"Flynn"**) for charging excessive prices to the UK's National Health Service (**"NHS"**) for the use of their drug in treating epilepsy, that was previously sold under the name *Epanutin*.

The CAT found that the CMA's conclusions on abuse of dominance were not well-founded as a matter of law, since the national competition authority did not correctly apply the test set forth in the *United Brands* case that is used for assessing excessive pricing under EU competition law, and that the CMA purported to apply, as subsequently developed by the EU and national courts.[1] The CMA acknowledged the excessiveness of the price by taking into account two factors:

- a "Cost Plus" approach, which consists of a comparison between the price charged by the companies and a reasonable price determined by the sum of direct costs, a proportion of indirect costs and a reasonable return on sales (**"ROS"**), which in the case at stake was set at 6% by read-across from a measure under the NHS pricing rules;
- the economic value of the product and the lack of a reasonable relation with the price charged.

CAT concluded that the overall assessment carried out by the CMA was defective as it considered unfairness "in itself", while it should have instead calculated the economic value more accurately by using meaningful comparators.

The case has been remitted to the CMA for further consideration as to the matters on abuse of dominance.

The CAT also took the chance to provide useful guidance to EU and national competition authorities as to the steps which ought to be taken in the assessment of unfair prices, given the increasing number of investigations that have been started in this respect.

Companies operating in the life science space have now a clearer view on how to cope with pricing issues.

Factual background

Phenytoin sodium is a drug commonly used for the treatment of epilepsy and for the prevention of seizures. As a branded drug, *Epanutin* was subject to price regulation, since under UK law the NHS has strict limits on branded drug expenses, pursuant to the Pharmaceutical Price Regulation Scheme (**"PPRS"**).[2] In September 2002, Flynn acquired the distribution rights from Pfizer and de-branded the drug. As a result the CMA found that the price charged for a 100mg pack was increased by up to 2,600% from £2.83 to £67.50.

The decision by the CMA

In its decision, which resulted in fines being imposed respectively on Pfizer and Flynn of £82.4 million and £5.2 million, the CMA observed that patients who were treated on *Epanutin* could not be switched to another manufacturer's capsule. The NHS was forced to accept the increased price for the drug, as patients subject to *Epanutin* treatment who were switched to other products could experience serious health consequences. Therefore, Pfizer could increase the price it charged for its manufacturing and supply to Flynn which accordingly raised its price in the distribution to the NHS. The CMA also remarked that prices in the UK were many times higher than elsewhere in Europe.

The CMA purported to apply the two-fold test set out by the Court of Justice of the European Union (**"CJEU"**) in *United Brands* for assessing the practice, which consists of determining whether the price is: i) excessive, by calculating the difference between the cost of production of the product and its selling price; and ii) unfair, either in itself or when compared to competing products.

[1] *Judgement by the CJEU of 14 February 1978, Case 27/76 United Brands ECLI:EU:C:1978:22.*

[2] *The Pharmaceutical Price Regulation Scheme 2014 – UK Department of Health: "It is important to strike a balance to promote the common interests of patients, the NHS, the industry and the taxpayer. The overarching principles and objectives of the scheme are to (...) support the NHS by ensuring that the branded medicines bill stays within affordable limits and deliver value for money for the NHS by securing the provision of safe and effective medicines at reasonable prices, and encouraging the efficient development and competitive supply of medicines".*

The excessiveness of the price was identified by the CMA by taking into account two factors:

- a "Cost Plus" approach, which consists in a comparison between the price charged by the companies and a reasonable price determined by the sum of direct costs, a proportion of indirect costs and a reasonable return, which in the case at stake was set at 6% - the 6% measure was derived from the NHS PPRS, which include a 6% target for return on sales on a basket of sales;
- the economic value of the product and the (lack of a) reasonable relation with the price charged.

Having established that there was no additional economic value in the phenytoin capsules beyond Cost Plus, the CMA found that Pfizer's and Flynn's prices were unfair in themselves, as they bore no reasonable relation to the economic value of the product. It did not accept the need to conduct comparisons against other products.

The decision by the Competition Appeal Tribunal

In its judgment, the CAT preliminarily observed that the two-fold test set out in *United Brands* is a *"deceptively simple approach and is not easily applicable to all cases in which it might be required"* and noted that under EU jurisprudence other ways may be devised of selecting the rules for determining whether the price of a product is unfair.

Against this background, the CAT evoked the recent preliminary ruling issued by the European CJEU in the *AKKA/LAA* case which concerned an alleged imposition of unfair prices in the collection of copyrights fees for public performance of musical works.[3] In its decision, the CJEU ruled that when determining the unfair nature of the prices, there is no minimum required number of countries for comparison; this entails that competition authorities must adopt a benchmark in accordance with objective, appropriate and verifiable criteria and on a consistent basis.

Furthermore, the CAT shared the opinion released by Advocate General Wahl in the same case. Advocate General Wahl observed that different methods exist for the assessment of unfair prices, each of those revealing some inherent weaknesses, and that the most suitable approach would be to combine several methods in order to determine whether a price is unfair, thereby suggesting the adoption of a more discretionary approach.[4] This seems also in line with the approach taken by UK case law, particularly with respect to the judgment in the *Napp case*.[5]

As to the assessment of the excessiveness of the prices, the CAT considered the CMA's shortcomings in the adoption of the Cost Plus approach, which did not accurately reflect the competitive framework of the market. By adopting a theoretical approach, the CMA failed to make an effective comparison with other products or companies, which would have placed Pfizer's and Flynn's prices in their commercial context. The CMA's reliance on the 6% profit cap set forth under the PPRS was also criticized, as it did not provide a suitable benchmark to use within the scope of the Cost Plus analysis.

The CAT observed that the CMA failed to ascertain whether those prices were also unfair when compared to competing products. In particular, the CMA identified at the outset and assessed three potential products that could provide the basis for a comparison (i.e., parallel imports, capsules of a competing firm and phenytoin tablets); however, the CMA concluded that these products would not provide a meaningful comparison in the assessment as to whether prices charged by Pfizer and Flynn were unfair. Having regard to phenytoin tablets, the CAT held that they should not have been ruled out as a comparator in the assessment of the price of Pfizer's and Flynn's phenytoin capsules. The overall assessment carried out by the CMA was defective as it considered unfairness "in itself", while it should have also calculated the economic value more accurately by using meaningful comparators, such as phenytoin tablets sold by competitors.

[3] *Judgement by the CJEU of 14 September 2017, Case C-177/16, AKKA/LAA. ECLI:EU:C:2017:689.*

[4] *Opinion delivered by Advocate General Wahl on 6 April 2017, Case C-177/16, AKKA LAA. ECLI:EU:C:2017:689.*

[5] *Judgement by the CAT of 15 January 2002, Napp.*

Takeaways

Although excessive pricing would seem a textbook case for enforcement under Article 102 TFEU, the EU and national decisional practice is limited and, at this point, controversial.

There have been comments made following this decision that EU and national courts often struggle to find an accepted and consistent approach. We do not wholly agree with this. Antitrust authorities – Italian and UK in the specific recent cases[6] – seem to have consistently focused on costs analysis, and of course in the markets where IP rights (or know-how) play a crucial role (R&D in the case at hand), the costs analysis can be articulated but not impossible.

In most circumstances, markets should be able to self-correct the imposition of prices significantly above the competitive level, by way of attracting new entrants or encouraging retaliation by existing competitors. Therefore, competition authorities should be wary of casting themselves as price regulators. In addition, an intrusive approach by antitrust authorities could reduce the incentives to invest and innovate by lessening the returns of these decisions. This follows similar warnings contained in the opinion of Advocate General Wahl in the A*KKA/LAA* case and seems to a certain extent to be aligned to the more liberal approach adopted in the US.[7]

The CAT decision here may provide helpful clarity to regulators. Following a thorough analysis of the case at stake, the CAT set out a list of actions that should be undertaken by competition authorities in assessing excessive pricing. In particular, according to the CAT, antitrust authorities should:

– consider a range of possible analyses, reflecting market conditions and the extent and quality of the data that can be obtained, to establish a benchmark price, or range, that reflects the price that would pertain under conditions of normal and sufficiently effective competition, by considering that criteria for selection and application must be objective, appropriate and verifiable;

– compare that price (or range) with the price that has been charged in practice and determine whether that is excessive;

– form an assessment on the excessiveness of the price of whether there is a sufficiently significant and persistent differential to be considered excessive in light of factors such as size, reasons, previous decisions and market conditions;

– whether there is a finding on excessiveness of the price, consider whether the price is unfair, either in itself or compared to competing products;

– if there is a finding on unfairness, assess what is the economic value of the product and whether the price charged in practice bears no reasonable relation to it;

– give appropriate consideration to any objective justification advanced by the dominant undertaking.

The list detailed above could provide useful guidance to antitrust authorities in the steps that ought to be taken in the assessment of unfair prices, particularly with respect to the increasing number of cases currently under examination by EU and national authorities.

Contacts

Sabrina Borocci
Partner, Milan
T +39 (02) 720252 384
sabrina.borocci@hoganlovells.com

Eugenia Gambarara
Senior Associate, Milan
T +39 (06) 6758 2324
eugenia.gambarara@hoganlovells.com

[6] *See decision by the CMA of 7 December 2016, Case CE/9742-13, Pfizer and decision by the Italian Competition Authority of 29 September 2016, Case A480, Aspen.*

[7] *Judgement by the Supreme Court of the U.S.A. of 13 January 2004, Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407.*

Good things don't always come in small packages for the European Commission: Advocate General Kokott delivers her Opinion on the blocked UPS/TNT deal

On 25 July 2018, Advocate General Kokott proposed that the EU Court of Justice validate the annulment by the EU General Court of the European Commission's 2013 prohibition decision of UPS's planned acquisition of its logistics rival, TNT. In particular, Advocate General Kokott has confirmed in her (non-binding) opinion that the General Court was justified in censuring the Commission and, in turn, quashing the prohibition decision, on account of a fatal procedural error committed by the Commission during its phase II administrative review.

In the event that the Court of Justice follows Advocate General Kokott's views (and thus confirms the General Court's findings), this would be an extremely rare instance of the EU Courts overturning a decision of the Commission to block a deal. It would also act as a strong (and possibly costly) reminder to the Commission of the importance of respecting procedural safeguards – 'procedural guarantees' which, Advocate General Kokott reminds us, cannot be compromised despite the understandable "*desire to incorporate more economic expertise into the assessment of competition cases*".

Background

In 2012, United Parcel Service (UPS) notified the Commission under the EU Merger Regulation that it intended to acquire its Dutch rival, TNT Express (TNT). Following an in-depth phase II administrative review of the transaction (and despite commitments offered by the parties aimed at addressing competition concerns), the Commission issued a prohibition decision blocking the deal. Such a merger prohibition is a relatively rare occurrence, with the Commission having only blocked four deals in the preceding ten years and only a further four deals since.

The primary concern identified by the Commission was in relation to 'international express small package delivery services'. At the time there were only four companies (also known as 'integrators') offering this service in the EEA – in addition to the transacting parties, these were DHL (considered to be the most important competitor) and FedEx (a global heavyweight but considered to be a weaker player in Europe). The Commission identified irreconcilable competition concerns in 15 EU Member States, in large part on the basis of an econometric model that showed likely price increases resulting from the proposed merger.

General Court judgment

UPS proceeded to lodge an appeal with the General Court for annulment of the prohibition decision on the basis that, amongst other things, the Commission had relied on an amended version of the econometric model (concerning the likely effects of the merger on price) which had not been discussed with the parties during the administrative procedure. In particular, UPS claimed that it had not been given the opportunity to challenge the model in question, which incorporated non-negligible changes to a version of it that UPS had seen previously. This omission by the Commission was, UPS argued, a fundamental procedural breach – amounting to an infringement of UPS's rights of defence.

The General Court agreed, noting that observance of the rights of the defence is a general principle of EU law (enshrined in the Charter of Fundamental Rights of the European Union) which must be guaranteed in all proceedings, including merger proceedings before the Commission. The implication of this procedural irregularity in the matter at hand meant that the Commission's decision needed to be annulled in its entirety, without it being necessary for the General Court to examine the other issues that were raised in UPS's appeal. That being said, the General Court noted that its conclusion was not based on any argument that the decision would necessarily have been different had such procedural safeguards been respected. Rather, its judgment focused on the issue of UPS not being afforded the opportunity to defend itself better, given the non-negligible changes made to the econometric model.

Whilst merger prohibition decisions are not common, instances of the General Court annulling such decisions are almost unheard of – the last (and only) time this happened previously was in 2002, when the General Court's predecessor (the Court of First Instance) nixed three Commission prohibition decisions: *Tetra Laval/Sidel, Airtours/First Choice* and *Schneider/Legrand*.

At the same time as UPS was challenging the Commission decision before the General Court, FedEx (which itself intervened in the UPS's appeal on the side of the Commission) was making its own moves on TNT – eventually agreeing a €4.4 billion tie-up in April 2015.

This deal was also subject to in-depth scrutiny from the Commission but ultimately received the green light in 2016 (before the General Court's judgment was handed down in relation to UPS's action for annulment).

Advocate General opinion

The Commission lodged an appeal with the Court of Justice requesting that the General Court judgment be set aside – arguing that UPS's rights were not infringed or, in the alternative (and even if its rights were technically infringed), that the decision to prohibit the deal would have been the same regardless.

Advocate General Kokott, however, disagrees in her opinion and concludes that the General Court was justified in annulling the decision on the basis of this procedural issue. In her view, the econometric model undoubtedly constituted an "*element*" on which the Commission based its decision. Furthermore, the "model was one of the key foundations for the objections" raised by the Commission when blocking the deal. As a result, UPS should have been given the opportunity to express its views on the amended model and exercise its rights of defence.

Advocate General Kokott's view on the implications for the Commission's substantive assessment goes slightly further than the findings of the General Court. In its judgment, the General Court set out that the relevant test for annulment is whether "*there was even a slight chance that [UPS] would have been better able to defend itself*". In her opinion, Advocate General Kokott considers that, based on the facts, "*it cannot be ruled out that the procedural error affected the content…and the decision might have been substantively different*". She goes on to note that, while the Commission's econometric model found competition problems in 15 Member States, the Commission only found a problem in two Member States based purely on qualitative considerations – ie, when not using the amended econometric model in question. She suggests that a company attempting to address competition concerns and offer commitments for two national markets, rather than substantially more, will obviously have a better chance of convincing the Commission.

Advocate General Kokott also notes that the final version of the model, which was not shared with UPS, existed over two months before the prohibition decision was taken. On this basis, she rejects the Commission's arguments that the legally-binding timing constraints of a merger control review prevented it from hearing UPS's views.

What's next?

The Court of Justice will now examine the case in light of Advocate General Kokott's advice and deliver its judgment likely some time later this year. Though not binding, Advocate General opinions are followed by the Court of Justice in the vast majority of cases. If this proves to be so here, such a judgment would be significant, serving as a reminder to the Commission about procedural requirements – when the Commission has itself in recent years been pursuing companies for alleged procedural merger control infringements (Marine Harvest, Facebook and Altice amongst others).

Although a judgment confirming the General Court's findings would seem a somewhat hollow victory for UPS (given that the Commission's prohibition effectively allowed its rival, FedEx, the opportunity to move in itself and buy TNT), it could still be potentially significant in terms of a €1.74 billion damage claim that UPS is pursuing against the Commission as a result of its missing the opportunity to acquire TNT (UPS lodged an action for non-contractual liability with the General Court on 29 December 2017). It will also be interesting to see how a US company pursuing the Commission for significant compensation is perceived on the other side of the Atlantic, given the current political climate (and, in particular, in light of the eye-wateringly high antitrust fines and State aid reimbursement demands which the Commission has recently imposed on major US corporates).

Contacts

Mark Jones
Partner, London
T+44 20 7296 2428
T+32 2 505 0940
mark.jones@hoganlovells.com

Christopher Peacock
Associate, London
T +44 20 7296 5630
christopher.peacock@hoganlovells.com

Digital competition policy on the move: Price algorithms in the German Monopolies Commission's spotlight - EU Commission launches public consultation process

Competition policy in the digital economy is gaining shape. Competition law concerns around price algorithms, big data and digital platforms are clearly the "talk of the town" in the European competition law community these days. On 3 July 2018, the German Monopolies Commission published its 22nd Biennial Report in which it discusses potential anti-competitive effects of price algorithms and proposes far-reaching amendments to the competition law enforcement framework. Meanwhile, the EU Commission has launched a consultation process with a view towards shaping competition policy in the era of digitization.

Price algorithms in the focus of European competition authorities

Across Europe, competition authorities are currently putting a focus on algorithms. In recent months, both the German Federal Cartel Office **(FCO)** and the Austrian Federal Competition Authority have assessed the use of price algorithms in the airline industry. In addition, the price algorithm used by a taxi app has been subject to competition law review. Finally, the French Autorité de la Concurrence and the FCO announced the launch of a joint research project to investigate algorithms and their implications on competition.

Monopolies Commission: Serious risks to competition

It its 22nd Biennial Report the Monopolies Commission devotes an entire chapter to the issue whether, and if so, to which extent the use of price algorithms may enable or even facilitate infringements of competition law. The Monopolies Commission is an advisory board advising the German Federal Government, the legislation and the general public in the area of competition policy, competition law and regulation. Although the Monopolies Commission has no direct means of intervening, it nevertheless exerts considerable influence on the legislative process as well as public opinion through its Biennial Reports on current competition policy issues.

The focal point of the Monopolies Commission's analysis is the concept of collusion. Collusion is typically understood as a market result in which companies realize higher profits than in a competitive environment by way of coordination, for example in relation to prices or quantities. Even though the Monopolies Commission acknowledges that various advantages for consumers may be associated with the use of price algorithms, it identifies the following competitive concerns:

- In data-intensive sectors, such as the internet economy, price algorithms can increase transparency in the markets and, thus, facilitate explicit collusion by automating and accelerating collusive pricing
- The use of price algorithms could also make explicit agreements restricting competition dispensable as they reduce the need for such agreements between companies
- In the case of self-learning algorithms, the crucial (i.e. potentially anticompetitive) business decision is already made at the time of the decision regarding the price algorithm and is not made in the price-setting process (which would then be executed automatically and periodically by the algorithm once it is established)
- The use of price algorithms tends to make the discovery of collusive behavior by competition authorities more difficult, both in terms of the determination of an anticompetitive agreement and the proof of potentially excessive prices

Proposed solution: Increased use of sector inquiries on the initiative of consumer associations

Against this background, the Monopolies Commission recommends an enhanced market monitoring by expanding the enforcement tool of sector inquiries especially in data-intensive sectors. According to the Monopolies Commission, information on possibly collusive excessive pricing is most likely to emerge at the level of consumer associations. As a result, consumer associations should receive a right to initiate sector inquiries. Detailed reasons would have to be provided by the FCO in case of a rejection of such applications.

If concrete indications were to arise from the market monitoring that the use of price algorithms enhances collusive market results and obfuscates its discovery, the Monopolies Commission considers two more legal aspects:

- Reversal of the burden of proof in competition proceedings with regard to the damage caused by an infringement of competition law; meaning that the finding of a collusive use of price algorithms would give rise to the presumption of an excessive price
- Far-reaching extension of liability for competition law infringements to third parties such as IT service providers regarding the design of price algorithms.

EU Commission calls for participation in shaping digital competition policy

As yet, the measures proposed by the Monopolies Commission are of a theoretical nature. However, the increasing activities of competition authorities across Europe do make one thing very clear: The fundamental framework for the enforcement of competition law in the digital economy is being negotiated (and eventually determined) right now!

Against this background, the EU Commission has started its own consultation process on these very issues: On 19 January 2019 a conference about *'Shaping competition policy in the era of digitization'* will be held by the EU Commissioner for Competition Margarethe Vestager. All stakeholders involved are invited to issue statements before 30 September 2018.

The Commission is specifically encouraging a discussion on the implications of digitization for competition policy with a focus on the following topics:

Competition, data, privacy and AI: In this category, the EU Commission refers to a world of ubiquitous data, thanks to, for example, 5G, the Internet of Things and connected cars and raises the question if data bottlenecks – or, conversely, data access, data sharing or data pooling – are causing competition issues? Further, it raises questions, such as: In which ways should privacy concerns serve as an element of the competition assessment? How can it be ensured that AI technology is as competitive as possible, given that data is the raw material of AI?

Digital platforms' market power: In this category, the EU Commission reflects on the interests of platforms being not always aligned with the interests of their users, which can, as a result of platforms' market power, give rise in particular to: a) leveraging concerns (digital platforms leveraging their positions from one market to another); and b) lock-in concerns (network externalities, switching costs, better service due to accessibility of data make it difficult for users to migrate to other platforms, and allow platforms to "exploit" their user bases). According to the EU Commission, this raises questions as to what should/can competition policy do to address these concerns and how.

Preserving digital innovation through competition policy: In this category, the EU Commission raises e.g. the following questions: Do network effects, economies of scale and 'copycat' products impede innovation? In digital merger cases, is there scope to apply theories of harm based on a loss of innovation and/or loss of "potential competition" more often? Would a focus on innovation require updating the EU Commission's analytical tools?

Conclusion

The recent developments show that European competition authorities are getting more and more involved with competition law challenges resulting from the digital economy. And again a major initiative comes from Germany where the FCO has already been at the forefront of pushing into this area. Within the last two years, the FCO took several initiatives to lay the groundwork for future cases, e.g. a joint thought leadership paper with the French Autorité de la Concurrence on *'Competition Law and Data'* (May 2016), the ninth amendment of the German competition law introducing new provisions focusing on adapting its competition law to the digital age (June 2017) or the launch of sector inquiries into smart TVs manufacturers (December 2017) and into the online advertising sector (February 2018).

With the EU Commission now officially opening the scene on *'Shaping competition policy in the era of digitization'*, the message is clear: If companies want to have a say in how competition law should be applied in the future, in particular in digital industries, they have to become active now!

Contacts

Christian Ritz, LL.M. (USYD)
Senior Associate, Munich
T +49 89 290 12 0
christian.ritz@hoganlovells.com

Dr. Lorenz Marx, LL.M.
Associate, Munich
T +1 202 637 6508
lorenz.marx@hoganlovells.com

A changing landscape? What AT&T/Time Warner means for future deals

In one of the most significant antitrust cases in recent years, AT&T won the right to merge with Time Warner when Judge Richard Leon ruled in their favor in June 2018.

AT&T and Time Warner announced their merger in October 2016. The merging parties touted the synergies that they could achieve by combining AT&T's distributional power with Time Warner's unique content.

After an extensive review of the merger, the U.S. Department of Justice (DOJ) filed a complaint to block the deal in the District Court of the District of Columbia on 20 November 2017. The trial began on 19 March 2018 and continued for the next six weeks.

In opposing the transaction, the DOJ primarily relied on the theory that AT&T would use Time Warner's "must have" content as leverage to extract higher affiliate fees from rival distributors, thereby harming competition in the content distribution market. This is somewhat different from the traditional "foreclosure" analysis in vertical deals, which focuses on the extent to which the acquirers' competitors cannot compete effectively without access to the target's product. The DOJ also argued that AT&T would act to deter new, virtual distributors by restricting their access to popular Time Warner content. Finally, the DOJ contended that the merged entity could restrict the use of HBO as a promotional tool by other distributors. This "vertical" theory of harm is not new, but the U.S. antitrust enforcement agencies had not challenged a merger on this theory in 40 years before this complaint was filed.

In rejecting the government's theories of harm, Judge Leon found that the government ultimately "failed to meet its burden to establish that the proposed transaction is likely to lessen competition substantially." Below are some key takeaways from the opinion.

1. Consumer harm is harder to prove for vertical mergers than it is for horizontal mergers.

When it challenges a horizontal merger, the government can rely on combined market share statistics to trigger a "presumption" that a transaction will "substantially lessen competition." By contrast, there is no similar presumption that applies in a vertical merger challenge. Judge Leon noted that the government itself admitted that it was required to make a "fact-specific" showing that the proposed merger is "likely to be anticompetitive" in order to meet its burden under Section 7 of the Clayton Act. The AT&T case demonstrates how the economic complexities surrounding vertical deals can make it more difficult for the government to challenge vertical mergers—particularly when the government seeks to rely on theories of harm for which there is little precedent.

Judge Leon systematically analyzed the government's evidence, including the underlying assumptions relied upon by the government's economic expert in constructing the DOJ's economic model. The judge was also dismissive of the DOJ's reliance on past statements by AT&T and Time Warner in regulatory filings and in their ordinary course business documents, concluding that such statements were either only of "marginal" probative value or "speculative" in the case of competitor testimony relating to the merger's future effects. Instead, Judge Leon placed greater stock in "real-world" studies based on data from past vertical transactions (including the Comcast/NBCU transaction in 2011) and testimony from industry executives about their past experiences participating in content negotiations.

2. Innovation and dynamic competition are important components of the competitive effects analysis.

Judge Leon devoted considerable attention to analyzing the changing media landscape, describing in detail various industry trends such as the "rise and innovation of over-the-top, vertically integrated video content services," "declining [multichannel video programming distributor] subscriptions," and the "shift toward targeted, digital advertising." He specifically noted the numerous technological challenges AT&T and Time Warner would likely face if they do not merge as it becomes more difficult to capture the attention of consumers.

These developments directly informed Judge Leon's substantive legal analysis, as he resolved that he could not "evaluate the Government's theories and predictions of harm ... without factoring in the dramatic changes that are transforming how consumers view video content." He positively referred to AT&T's

emphasis on the financial success of competing technologies in related markets, changes in consumer demand, and the need to play catch up in order to compete more effectively in a post-cable world. Similar narratives could be successful in future cases involving dynamic markets.

3. This outcome makes future DOJ merger enforcement more difficult, particularly in vertical cases.

The AT&T/Time Warner case has taken place in the context of a larger debate in antitrust law on the role of behavioral and structural remedies in addressing potential competitive harm from a vertical merger. Though the court did not wade directly into the remedy debate, Judge Leon positively cited the unilateral behavioral remedy adopted by the merging parties. Soon after the DOJ filed its complaint, Time Warner sent an irrevocable arbitration offer to over 1,000 video distributors to allay fears of heightened bargaining power. This remedy was modeled on the behavioral remedy in the Comcast/NBCU vertical deal from 2011, which was approved by the Federal Communications Commission, the DOJ, and Judge Leon. This strategy proved successful in the AT&T/Time Warner case, as it provided Judge Leon with a basis for assessing the merger's potential competitive effects.

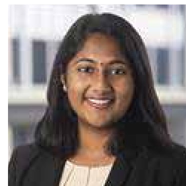
As a result of the court's implicit approval of behavioral remedies, the DOJ now finds itself in a difficult place. DOJ officials have spent the past few months proclaiming the ineffectiveness of behavioral remedies, which has made the agency hesitant to use them in many vertical transactions. At the same time, standalone structural remedies may be overly broad in addressing competitive harm, as courts, as in the AT&T case, may be willing to look at past consent decrees the DOJ entered into as evidence that behavioral relief can address such concerns. Companies may look at this changing landscape and do what AT&T and Time Warner did: come up with unilateral remedies to strategically avoid the imposition of structural or external behavioral remedies altogether. Concurrent with the Court's review of this vertical merger, the U.S. Federal Trade Commission in June accepted a behavioral remedy as being sufficient to remedy potential vertical concerns in the Northrop Grumman acquisition of Orbital ATK. Therefore, despite the rhetoric from DOJ officials on the infirmities of behavioral remedies to address vertical concerns, we now have two decisions within a week that may demonstrate otherwise.

Because of the detailed and fact-specific nature of this opinion, it is unlikely that a reviewing court would disturb Judge Leon's findings if the DOJ decides to seek an appeal on the merits. The outcome of this case will undoubtedly continue to affect future vertical transactions within this industry and beyond.

Contact

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

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



Suparna Reddy
Associate, Washington, D.C.
T +1 (202) 637 8851
suparna.reddy@hoganlovells.com

Communications and competition: we've got the tools for the gigabit society

Since the announcement on 6 June that the Council and European Parliament had reached agreement on the draft Directive establishing the Electronic Communications Code (the "Code"), the communications and competition communities have been on tenterhooks to see what the final version of the text contains.

The draft Code has been in the pipeline for almost two years and is part of the Commission's Digital Single Market Policy. It is designed to set EU-wide common rules and objectives on how the telecoms industry should be regulated. The Commission's aim has been to update the rules, taking account of technological developments, and to create the regulatory framework to enable the roll-out of 5G and new generation technologies in the context of the EU's ambitious 2025 connectivity targets.

The audience from around the globe at the IBA's 29th Annual Communications and Competition Conference in Milan was – while waiting with baited breath for the final text – cautiously optimistic.

In addition to provisions on the availability and predictability of access to the spectrum licences required for the deployment of 5G networks, the Code also focuses on creating a predictable investment environment, including through the provision of "regulatory holidays" where certain conditions are met.

Discussion at the conference focused on investment incentives, co-investment models and access to passive infrastructure. There was a consensus from regulators and industry alike that the Code is a welcome codification and revision – creating a European environment in which tech can flourish.

A Commission Official also discussed the regulatory challenges posed by emerging tech markets. In particular – how can and should regulation apply to companies which do not (yet) have significant market power ("SMP") in the context of the recently updated SMP Guidelines and the related difficult task of assessing and finding joint dominance (at all and especially in dynamic markets).

However, the atmosphere of optimism extended to the ability of the existing competition rules to deal with new tech and the digital economy. First – there are lessons to be drawn from experience in other industries where innovation is also important (for example pharma and agri-chemicals markets). Second – there was a clear message that "what's illegal offline is likely to be illegal online". This applies in particular to collusion through algorithms and competition issues which blockchain may give rise to.

So – while there will undoubtedly be difficult legal and regulatory questions ahead for this sector, there is also lots to look forward to.

Contacts

Angus Coulter
Partner, London
T +44 20 7296 2965
angus.coulter@hoganlovells.com

Alice Wallace-Wright
Senior Associate, London
T +44 20 7296 5922
alice.wallace-wright@hoganlovells.com

New UK foreign investment screening rules come into force

New provisions, which came into force on 11 June 2018, introduce lower merger control thresholds for transactions in certain sectors. These revised thresholds are designed to provide the UK Government with increased scope to scrutinise foreign investments and transactions that raise national security concerns.

The changes were accompanied by guidance from the UK Competition and Markets Authority (CMA) and the Department for Business, Energy and Industrial Strategy (BEIS) on how they expect the regime to operate in practice.

Increased jurisdiction over military, dual-use and advanced technology sectors

In October 2017, the UK Government consulted on short and long-term reforms to the public interest regime (see our previous briefing note). The new provisions, which amend the Enterprise Act 2002, implement the short-term proposals by expanding the UK merger control regime to include smaller businesses active in the military and dual-use sectors, and the advanced technology sector.

Since the Enterprise Act 2002 came into force, the UK Government can formally intervene in cases caught by the UK thresholds (and smaller transactions involving government contractors) only where specified public interest considerations are engaged. In expanding the UK merger control regime to encompass smaller transactions in certain sectors, the new provisions increase the scope for the UK Government to use its powers to intervene in transactions in the relevant sectors.

Transactions in the affected sectors will now fall within the UK merger control regime, and therefore be susceptible to intervention from the UK Government, where either of the following reduced tests is met:

- the target's turnover exceeds £1 million (reduced from £70 million); and/or
- the target alone has a share of supply or purchase of at least 25% of any goods or services in the defined sectors (dispensing with the need for an increment to the share of supply).

In all other sectors, the rules remain unchanged. It is therefore important for parties to know whether or not they fall within the new thresholds. The BEIS Guidance provides details of the types of business activities, goods and services which fall within the new thresholds. Briefly put, they include the development and production of military items and dual-use items which are subject to export control, and the holding of related information. The advanced technology sector comprises activities relating to computing hardware and quantum technology:

- Computing hardware – this covers businesses that own, create or supply intellectual property relating to the way that computer processing units function and that provision or manage roots of trust in relation to processing units
- Quantum technology – this refers to businesses that carry out research into, design or manufacture quantum technology (ie quantum computing or simulation; quantum imaging, sensing, timing or navigation; quantum communications; and quantum resistant cryptography). The use of quantum goods or services provided by others is not in scope.

The role of the CMA

Where the Secretary of State has intervened in a transaction, the CMA is required to review the transaction from a competition perspective, and to collate representations on the public interest issues in a report to the relevant Secretary of State. However, it is the Secretary of State who will make the decision on the outcome of the review (ie, approve the transaction, impose conditions, or block or unwind the transaction). The CMA's workload will now include reviewing those transactions caught by the new regime where the Secretary of State has intervened.

The changes also have the effect of extending the CMA's jurisdiction to assess transactions caught by the new thresholds on competition grounds alone. However, the CMA has confirmed in its Guidance that it does not expect the new provisions "*to bring about a material change in its approach to the assessment of mergers on competition grounds*". This is on the basis that transactions that meet the lower thresholds (but not the

original thresholds) are unlikely to raise competition concerns, and accordingly the CMA does not anticipate opening any own-initiative competition investigations in transactions where it previously would not have had jurisdiction.

Impact on transactions in the affected sectors: what should you do?

The real effect of the new provisions will be in relation to transactions that raise national security concerns in the relevant sectors. The BEIS Guidance explains that, based on the UK Government's analysis, the lower thresholds will catch between 5 and 29 additional transactions a year, but it expects "*only a small minority of these (1 to 6 per annum) to raise national security concerns requiring the issue of a Public Interest Intervention Notice by the Secretary of State*". By comparison, since the Enterprise Act 2002 came into force, there have only been a total of 13 public interest interventions (on any ground) over a period of 15 years and, of these, 7 raised issues of national security.

Parties to mergers in the affected sectors will be well advised to assess if they fall within the scope of the rules, and if so, should start engaging with the relevant Government department at an early stage to establish whether an intervention (and therefore CMA review) is likely. The CMA has indicated that parties should engage with the relevant Government department, as the CMA will not be in a position to provide substantive guidance. The relevant departments are the UK Ministry of Defence in respect of activities in the military sector, the UK Department for Culture, Media and Sport in respect of quantum technologies, and BEIS in respect of the dual-use and computing hardware sectors as well as general queries.

What's next?

It is important to remember that the UK continues to operate a voluntary merger control regime, and parties continue to be able to decide whether to notify transactions (including those which raise national security concerns). The changes implemented in June do not change the voluntary nature of the regime. However, the long-term proposals (the details of which are not yet clear) include an expansion of the CMA's call-in power as part of a voluntary regime and the introduction of a mandatory notification regime in relation to foreign investment in certain areas of the economy.

At the European level, proposals for a framework to screen and review foreign investments on the grounds of security or public order are going through the legislative process. If approved, the EU proposals are likely to come into force in 2019, but it remains to be seen what impact, if any, these will have on the UK Government's intention to increase further its ability to intervene in mergers on national security grounds. The timing of the proposed long-term reforms in the UK also remains unclear, as the UK Government has commented that it will publish a response to the consultation on these "*in due course*".

The Hogan Lovells global competition and trade teams are uniquely placed to advise affected businesses on transactions which may raise national security issues in the UK and/or elsewhere in the world

Contacts

Aline Doussin
Partner, London
T +44 20 7296 2402 (London)
+32 2 505 0913 (Brussels)
aline.doussin@hoganlovells.com

Christopher Hutton
Partner, London
T +44 (20) 7296 2402
christopher.hutton@hoganlovells.com

Aniko Adam
Senior Associate, London
T +44 (20) 7296 5363
aniko.adam@hoganlovells.com

U.S. federal courts are not bound by a foreign government's submission when resolving conflicts between U.S. antitrust law and foreign law

On June 14, 2018, the United States Supreme Court ruled in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.* that federal courts are not bound to treat as conclusive a foreign government's statements submitted in a legal proceeding. In so holding, the Court vacated an appellate court judgment in which several Chinese vitamin C exporters escaped federal antitrust liability because the Ministry of Commerce of the People's Republic of China (MOFCOM) allegedly mandated their anticompetitive conduct.

While the Court recognized that a foreign government's statements of its own law should be afforded "respectful consideration," it held that federal courts need not afford such statements "conclusive effect" and may consult alternative sources to determine the content of foreign law. For companies with international operations, the Supreme Court's decision provides important guidance on the types of issues that can come up in cross-border litigation and the compliance challenges that can arise when confronted with potential conflicts of law between countries.

The District Court's Decision and Reversal by the Court of Appeals

In 2005, Animal Science Products and other U.S. based purchasers of vitamin C sued four Chinese vitamin C suppliers. The plaintiffs alleged that the suppliers, with the help of their trade association, the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("Chamber"), violated Section 1 of the Sherman Act by fixing prices for vitamin C manufactured in China and exported for sale to the U.S. between December 2001 and January 2005.

The defendants initially moved to dismiss the complaint, claiming that they acted pursuant to Chinese law and were shielded from liability by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity.[1] MOFCOM filed an amicus curiae brief in support of the defendants in which it asserted that Chinese law authorized the Chamber to regulate vitamin C export prices under MOFCOM's "direct and active supervision."[2] Before this case, no Chinese governmental entity had appeared amicus curiae in a federal court.[3]

The plaintiffs countered that MOFCOM did not cite any regulation or law expressly requiring the defendants fix prices in the manner alleged.[4] They also proffered their own expert testimony and cited a Chamber announcement stating that the defendants reached a "self-regulated agreement… whereby they would voluntarily control the quantity and pace of exports… without any government intervention."[5]

The district court denied the defendants' motion, holding that the record was "too ambiguous to foreclose further inquiry."[6] While the district court acknowledged that MOFCOM's position was "entitled to substantial deference," its submission was not treated as "conclusive" in light of the conflicting evidence presented by the plaintiffs.[7]

After discovery, defendants renewed their arguments in a motion for summary judgment. On that motion, MOFCOM submitted an additional letter stating that it had delegated authority to the Chamber to set price and output levels for vitamin C in consultation with the defendants.[8] The defendants also offered their own expert testimony to support MOFCOM's account.[9] The plaintiffs responded, in part, by arguing that MOFCOM's position in the instant litigation contradicted its past statements and directives, including its statement before the World Trade Organization (WTO) in 2002 in which it claimed that it "gave up export administration of… vitamin C."[10]

In 2011, the district court denied the defendants' motion for summary judgment, concluding that Chinese law did not require the defendants to fix vitamin C export prices.[11] It explained that MOFCOM had "fail[ed] to address critical provisions" of the 2002 export regime "that, on their face, undermine[d] its interpretation of Chinese law" and did not otherwise

[1] *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008).
[2] *Id.* at 552.
[3] *Id.*
[4] *Id.* at 554.
[5] *Id.* at 555.
[6] *Id.* at 559.
[7] *Id.* at 557.
[8] *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 533 (E.D.N.Y. 2011).
[9] *Id.* at 526.
[10] *Id.* at 532 (internal quotation marks omitted).
[11] *Id.* at 567.

attempt to reconcile its current position with its past statements, including the 2002 statement it submitted to the WTO.[12]

Following trial, a jury awarded the plaintiffs $147 million in treble damages. The court also enjoined the defendants from entering into price-fixing arrangements for vitamin C exports in the future. Hebei appealed to the U.S. Court of Appeals for the Second Circuit, leading MOFCOM to again submit an amicus curiae brief in support of the defendants.

The Second Circuit reversed the district court's judgment, holding that a federal court is "bound to defer" to a foreign government's construction of its own laws whenever the relevant government agency "directly participates in U.S. court proceedings" and offers a "reasonable" interpretation of its own law "even if that representation is inconsistent with how those laws might be interpreted under the principles of [the U.S.] legal system."[13] MOFCOM's participation was therefore decisive in the case, as the Second Circuit noted "that if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence... would have been entirely appropriate."[14]

In January 2018, the Supreme Court decided to review the Second Circuit's judgment to resolve a split among U.S. appellate courts on the degree of deference owed to a foreign government's construction of its own laws in U.S. federal judicial proceedings.

The Supreme Court's Decision

In a unanimous opinion authored by Justice Ginsburg, the Supreme Court held that the Second Circuit erred in treating MOFCOM's submission as conclusive.[15] As the Court noted, Federal Rule of Civil Procedure 44.1 "instructs that, in determining foreign law, '[a federal] court may consider any relevant material or source... whether or not submitted by a party."[16] Accordingly, a federal court "is not bound to adopt the foreign government's characterization nor required to ignore other relevant materials."[17]

While acknowledging that "no single formula or rule" could decide the "appropriate weight" that should be assigned to the views of a foreign government participating in a legal proceeding, the Court provided several "relevant considerations" that lower courts should analyze, including:

- "the statement's clarity, thoroughness, and support"
- "its context and purpose"
- "the transparency of the foreign legal system"
- "the role and authority of the entity or official offering the statement" and;
- "the statement's consistency with the foreign government's past positions."[18]

After outlining this multi-factor framework, the Court characterized the Second Circuit's approach as "unyielding" and inconsistent with the discretion afforded to federal courts under Rule 44.1, as well as the Court's treatment of "analogous" submissions from U.S. States (as federal courts only afford "respectful consideration" to the submissions of a State's attorney general).[19] Further, the Court distinguished its prior precedent in *United States v. Pink,* 315 U. S. 203 (1942), explaining that the case had evaluated the underlying record before drawing a conclusion as to whether a foreign government's proffered interpretation should be treated as "conclusive."[20]

Key Takeaways

Animal Science highlights the important role discovery will continue to play in disputes that involve the extraterritorial application of the U.S. antitrust laws. Because lower courts are not bound to defer to a foreign government's interpretation of its own laws and may conduct their own research and analysis in deciding questions of foreign law, courts may place greater weight on the role of experts and the record the parties develop. Parties subject to such suits should expect to engage in a more detailed analysis at the pleading stage

[12] *Id. at 551-552.*

[13] *In re Vitamin C Antitrust Litig., 837 F.3d 175, 189 (2d Cir. 2016).*

[14] *Id. at 191, n.10.*

[15] *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1874 (2018).*

[16] *Id. at 1869 (2018) (quoting Fed. R. Civ. P. 44.1).*

[17] *Id. at 1873.*

[18] *Id. at 1873-1874.*

[19] *Id. at 1874.*

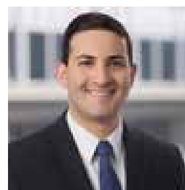
[20] *Id. at 1874-1875. The Court also highlighted that Pink was decided prior to Rule 44.1's enactment and that the case had arisen under "unusual circumstances."*

and, depending on how the district court approaches Rule 44.1 inquiries, be ready to engage with foreign-law experts at the earliest stages of litigation.

Animal Science also provides guidance on when federal courts may afford a foreign government's submissions less weight. Notably, the Court explained that "[w]hen a foreign government makes conflicting statements... or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission."[21] Similarly, the Court distinguished between sources of legal authority when discussing its treatment of "analogous" submissions from U.S. States, noting that only a decision of "the State's highest court" is "binding on federal courts" while an opinion offered by a State's attorney general receives "respectful consideration" but not "controlling weight."[22] Therefore, parties that cite to a foreign government's submission must also be able to contextualize their reliance on such statements by addressing other sources and materials that may seemingly conflict with the governmental entity's position–particularly the entity's past statements and other authoritative sources within the jurisdiction.

Finally, companies operating internationally should recognize that the risk that a foreign government's statement of its own law will not be treated as dispositive is not limited to U.S. federal court proceedings. Significantly, the Court pointed out that its approach is consistent with at least two international treaties (specifically, the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law), which "establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws."[23] In addition, the Court noted that, historically, the U.S. government "has not argued that foreign courts are bound to accept its characterizations [of U.S. law] or precluded from considering other relevant sources."[24] In light of international practice, companies engaging in cross-border conduct with potential anticompetitive effects (including activities otherwise mandated by their home country) should seek antitrust counsel given potential conflicts that can arise between domestic and foreign law.

Contacts



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

[21] *Id. at 1873.*

[22] *Id. at 1874.*

[23] *Id. at 1875.*

[24] *Id. (emphasis omitted).*

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
Riyadh*
Rome
San Francisco
Sao Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.
Zagreb*

*Our associated offices

www.hoganlovells.com

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

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

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

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

© Hogan Lovells 2018. All rights reserved. 1026196_EUd_0818