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This ACER Quarterly Newsletter includes Hogan Lovells articles, alerts, and blogs published between 1 December 2019 and 29 February 2020. The content was produced around the time of the developments in question. Matters covered may therefore have been subject to further developments since initial publication.

Dutch competition authority imposes fine on company for deleted chat messages during a dawn raid

The Dutch competition authority ("ACM") recently confirmed that the obligation to cooperate fully with an inspection/during a dawn raid is of utmost importance and of great relevance to companies under investigation. On 10 December 2019, the ACM issued an infringement decision fining an unidentified company EUR 1.85 million for obstructing an ACM inspection. This was on the basis that company employees deleted/destroyed potential evidence by deleting electronic chat and messaging services during the inspection.

The ACM's decision is available here.

Relevant facts of the case

The ACM performed an inspection at the premises of the company concerned back in 2018. The company in question was under investigation for alleged anti-competitive practices in violation of Dutch and EU competition laws.

The ACM's inspectors informed the company's manager at the outset of the dawn raid of their rights and obligations and explicitly emphasised that all members of the company were obliged by law to cooperate with the ACM throughout the entire inspection. As is the case with inspections performed by EU officials (and officials in other EU Member States), the obligation to cooperate also extends to an obligation not to destroy, withhold or in any other way dispose of (potential) evidence. Despite these warnings, a number of employees of the inspected company [allegedly] deleted numerous electronic chat and messaging conversations and exited respective chat groups during the course of the inspection.

Actions with significant consequences

The ACM considered this behaviour an infringement of the obligation to cooperate. It determined that the deleted conversations/groups could be relevant as potential evidence in the context of its investigation. As a result, the ACM initiated a proceeding against the company for the procedural breach of non-cooperation and concluded that the company ought to be fined. The ACM initially considered that an adequate fine would be EUR 2.3 million. Nonetheless, on the basis that the company's management and in-house counsel had promptly informed the ACM inspectors of the infringing activity and, subsequently, provided the ACM with all relevant information and available data (e.g. a list of the deleted chat groups as well as the names of the employees involved), the ACM reduced the fine by 20% to EUR 1.85 million in recognition of the company's full cooperation.

Background: The authority's powers to enforce

As a supervisory authority, the ACM is competent to uncover and sanction competition-distorting practices. For that purpose, the authority may perform inspections of a company's premises and access/seize an unlimited amount of data and/or documents. It addition, the ACM can demand full cooperation from every employee of the company under investigation – throughout the entire inspection (Article 5:20 of the Dutch General Administrative Law, "*Algemene wet bestuursrecht*"). This obligation to cooperate especially comprises the prohibition to withhold or destroy any evidence and the duty to leave all documents untouched.

Pursuant to Article 20 of EU regulation 1/2003, the European Commission has similar powers to enforce and reprimand these types of procedural infringements of EU competition law. In fact, the European Commission has sanctioned similar infringements regarding the obligation to cooperate in the past. Also, further jurisdictions have similar powers and sanctioning mechanisms and have, in fact, sanctioned such procedural infringements previously (these include the German, French and the Belgian competition authorities with whom the ACM has a very close working relationship).

High fine for limited damage? It's about the principle!

It is interesting to note that the ACM considered that a procedural infringement had taken place on the basis of the mere possibility that evidence relevant to the ACM's investigation into anti-competitive behaviour of the company could have been impeded and/or destroyed. Even though the ACM was eventually not able to reconstruct any of the lost content, it considered the mere fact that the electronic conversations and chat groups (in this case: WhatsApp messages and groups) were deleted in the course of the inspection (and that multiple employees were part of these groups and/or that messages were exchanged between employees), in-and-of-itself, an indication of the data's evidentiary purpose.

Moreover it must be borne in mind that the ACM has repeatedly clarified in its decision that the obligation to cooperate constitutes an indispensable aspect for the enforcement of Dutch and EU competition law. A company may be considered liable for its employees' actions once an infringement exhibits any connection to the company itself –whether it occurs on the company's premises or on company-owned electronic devices.

Key practical take-aways

Dawn raids and inspections are powerful tools used by the European and national antitrust authorities to investigate alleged antitrust violations. In our experience, dawn raids often represent an exceptional and very intensive situation for any company and its employees. Nevertheless, many companies are not sufficiently prepared to deal with such unannounced inspections and, as demonstrated in this case, may commit procedural errors that compound the situation and expose the company to even greater liability.

We see two key take-ways from this ACM decision. First, immediately after arrival of the authorities performing a dawn raid; an internal communication should be sent out to all employees of a company that no documents, e-mails and/or any other kind of communication should be destroyed (including information on phones, such as messages, e-mails and, even, private information). Second and more general, companies should view this decision as an opportunity to remind themselves of the importance of regular and thorough "dawn raid preparation" and training for their employees.

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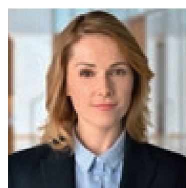

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New HSR and interlocking directorate thresholds announced for 2020

On 28 January 2020 the Federal Trade Commission (FTC) released the annual jurisdictional adjustments for premerger notification filings made pursuant to Section 7A of the Clayton Act, known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), as well as for Section 8 of the Clayton Act.

The new filing thresholds for HSR notification will become effective 27 February 2020 (30 days after publication in the Federal Register), while the revisions to Section 8 became effective immediately upon publication in the *Federal Register*.

Civil penalties for violations of the HSR Act, which are assessed per day for each violation, increased to US$43,280 effective 14 January 2020.

HSR notification thresholds

Under the HSR Act, certain acquisitions of assets, voting securities, or interests in noncorporate entities (such as partnerships or limited liability companies) are subject to preclosing filing (with the U.S. antitrust agencies) and waiting period requirements if the applicable jurisdictional thresholds are satisfied and no exemption applies.

Each year the FTC adjusts the HSR jurisdictional threshold tests based on changes to the U.S. gross national product. The threshold changes do not affect the amount of the applicable HSR filing fees to be paid, but do affect the threshold levels applicable to each of the filing fee levels.

The principal changes to the HSR jurisdictional thresholds will be as follows:

	Current threshold	New threshold effective 30 days after Federal Register publication
Size-of-transaction threshold test	Notification may be required if acquiring person will acquire and hold certain assets, voting securities, or interests in noncorporate entities valued at more than US$90 million.	US$94 million
Size-of-person threshold test	Generally, one "person" to the transaction must have at least US$180 million in total assets or annual net sales, and the other must have at least US$18 million in total assets or annual net sales.	At least US$188 million and US$18.8 million in total assets or annual net sales.
	Transactions valued at more than US$359.9 million are not subject to the size-of-person threshold test and are therefore reportable unless exempt.	US$376 million

	Current threshold	New threshold effective 30 days after Federal Register publication
Filing fee threshold levels	HSR filing fee of US$45,000 for transactions where the acquiring person will hold an aggregate total amount of assets, voting securities, or controlling noncorporate interests valued at more than US$90 million but less than US$180 million.	More than US$94 million but less than US$188 million. HSR filing fees remain unchanged.
	HSR filing fee of US$125,000 for transactions where the acquiring person will hold an aggregate total amount of assets, voting securities, or controlling noncorporate interests valued at US$180 million or more but less than US$899.8 million.	US$188 million or more but less than US$940.1 million. HSR filing fee remains unchanged.
	HSR filing fee of US$280,000 for transactions where the acquiring person will hold an aggregate total amount of assets, voting securities, or controlling noncorporate interests valued at US$899.8 million or more.	US$940.1 million or more. HSR filing fee remains unchanged.
Notification thresholds	When completing an HSR filing, the acquiring person in a voting securities acquisition must indicate which notification threshold it will cross – US$90 million, US$180 million, US$899.8 million, 25 percent (if the value of the voting securities to be held is greater than US$1,799.5 million), or 50 percent. These notification thresholds are also relevant to a certain HSR exemption.	The new notification thresholds are US$94 million, US$188 million, US$940.1 million, 25 percent (if the value of the voting securities to be held is greater than US$1,880.2 million), or 50 percent.

Interlocking directorates threshold

Section 8 of the Clayton Act prohibits a person from serving as a director or officer of two competing corporations if certain thresholds are satisfied and no exemption applies. The FTC is required to adjust annually certain thresholds related to Section 8 based on changes to the gross national product.

Under the new thresholds, which became effective 21 January 2020 upon publication in the Federal Register, a person may not serve as a director or officer of competing corporations if each corporation has capital, surplus, and undivided profits aggregating more than US$38,204,000, unless one of the corporations has competitive sales of less than US$3,820,400. Previously, a person was prohibited from serving as a director or officer of competing corporations if each corporation had capital, surplus, and undivided profits aggregating more than US$36,564,000 unless one of the corporations had competitive sales of less than US$3,656,400.

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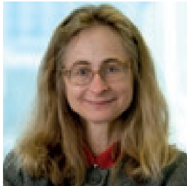

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China tables first set of amendments to the Anti-Monopoly Law

On 2 January 2020 China's antitrust authority, the State Administration for Market Regulation (SAMR), released a draft proposing amendments to the main antitrust statute in China, the Anti-Monopoly Law (AML) for public consultation.

The proposed amendments to the AML (Draft) are the first since the law came into effect in August 2008. Thus, perhaps the most important message that is being sent to the market is the very fact that the AML will be amended.

Overview

The Draft increases the number of AML provisions from 57 to 64, although the overall structure of the law, including the number and title of chapters, remains the same. Overall, in line with the professed goal of the revision, a "small amendment," there are relatively few proposed changes. However, this fact does not mean that the changes are without significance.

Fair competition review system

The Draft incorporates the "fair competition review system" (FCRS) into the framework of the AML. The FCRS is a policy initiative that was launched by the State Council of the People's Republic of China, China's cabinet, in 2016. That policy basically requires each government body throughout China to conduct a "self-assessment" of the compatibility of its rules with the principle of fair competition. There is a widespread recognition that many restrictions on competition in China, as a nation transitioning from a planned to a market-based economy, emanate from government actors (not only businesses). Hence, the FCRS is widely credited as an important step in tackling impediments to market competition in China. Its incorporation into the AML consolidates the efforts in that direction, and sends the very important signal that the central government and legislator continue to focus on challenging local government restrictions on competition.

Enhanced punishment regime

The inclusion of the FCRS into the AML regime had been largely expected by the antitrust community. Another set of changes has also been in the offering: Strengthening sanctions for breaches of the AML. This theme permeates throughout the Draft. The clearest example is the increase of the fine for failure to file reportable transactions under merger control rules, gun-jumping, noncompliance with merger remedies, or a prohibition decision – from the previous maximum of CN¥500,000 to a maximum of 10 percent of the companies' revenues from the last financial year. For a large company, a CN¥500,000 fine could hardly be said to be financially punitive or to be in any shape or form a deterrent.

But other parts in the punishment regime are also strengthened, as perceived "loopholes" are closed. As such, there is a new provision to account for the possibility of fining a third party for arranging a cartel or another anti-competitive agreement between companies (hub and spoke and possibly other situations). In addition, in the Draft, SAMR proposes to give itself powers to advise other government bodies to rectify the anti-competitive conduct they are engaged in (instead of referring the case to the authority hierarchically superior to the infringing body)

Big changes in merger control?

In terms of the specific chapters of the AML corresponding to different types of anti-competitive behavior, the biggest changes in the Draft are made to the merger control provisions. In a way, if taken to an extreme, the proposed amendment could lead to an important modification of the existing merger control regime. At present, the merger filing obligation is based on two key premises: that the deal at hand is a reportable transaction (a concentration between business operators) and that certain revenue-based filing thresholds are exceeded.

The Draft disappoints on both aspects. The current version of the AML defines a "concentration between business operators" mainly as an acquisition of a "controlling right" by one company over another, without however providing guidance on what a "controlling right" is. In the past 11 plus years of AML en forcement, the merger filing process has been shrouded in considerable uncertainty, as neither the former merger control authority (the Ministry of Commerce) nor its successor SAMR have provided clear-cut guidance on what exactly constitutes a "controlling right" (on many occasions, the authorities argued that such guidance should be enshrined in the AML itself, not in implementing rules).

The Draft proposes to clarify the term "controlling right," which is a commendable goal of itself. However, by using an overly broad definition, it fails to provide sufficiently clear and practical guidance for market participants.

As to the numeric filing thresholds, the Draft proposes to shift back the power to fix and change the thresholds from the State Council, which had set the existing thresholds based on only revenues back in 2008, to SAMR. The Draft does not set any procedural or substantive limits to this power. If left unchecked, this legislative amendment would (at least theoretically) allow SAMR to reset thresholds on short notice and/or depart from the revenues only benchmarks we have relied on to date without putting in place any specific safeguards to ensure that this does not work in an unpredictable or even unfair way.

Another quite far reaching proposal in the Draft is to incorporate a clause in the AML which allows SAMR to review concentrations below the thresholds. This option was listed in a State Council regulation until now. While transferring it into the AML would remove any ambiguity around whether there is an adequate legal basis for the current setup, it could also be interpreted as a statement of intent (as antitrust regulators globally are musing about introducing new thresholds to capture certain transactions below the thresholds, especially in the digital economy).

In short, the Draft could lead to a merger control regime with a diminished level of legal certainty and predictability, rather than greater.

The same effect could be brought about by the proposal to introduce a "stop the clock" option for SAMR to interrupt the merger review process instead of strictly following the statutory timeline and deadlines. While a more flexible approach to timing may work to the benefit of the merging parties in some cases, the overall effect could well be to inject additional uncertainty into the review process. Parties entering into a reportable transaction often see merger control filing as the single largest impact on timing to closing and want to know when they can start integrating the businesses: Previously it was at least possible to predict when the end point would be based on the statutory timeline, but this becomes less firm once you introduce the possibility of a "stop the clock" option.

Few changes outside merger control

In addition to merger control, the AML has three other chapters on prohibited anti-competitive conduct — monopoly agreements, abuse of dominance, and administrative monopolies, a term of art used to describe anti-competitive government activity.

The monopoly agreements and abuse of dominance provisions are left relatively untouched by the proposed amendments. Similarly, with a few exceptions, the AML chapter on administrative monopolies is modified only punctually.

In the monopoly agreements area, the most noteworthy point in the Draft is the absence of key changes, rather than new additions. Over the past years, there has been a broad discussion in the Chinese antitrust community, including by courts and regulators divided on the issue, as to whether resale price maintenance (RPM) is subject to an effects analysis and who bears the burden of proof. Somewhat disappointingly, the Draft does not clarify this issue. Admittedly, the Draft moves the definition of "monopoly agreement" to a different place in the chapter but – at this point – it is mere speculation as to what this move may effectively mean for the burden of proof in RPM arrangements. In addition, while the Draft clarifies that companies engaged in certain types of hardcore cartel conduct cannot seek to terminate an investigation by way of commitments, it falls short of introducing the notion of "per se" illegality for that type of conduct.

Even fewer changes are proposed in the abuse of dominance area. The only key change is the proposal to include a paragraph in the list of factors to be used to assess whether a company has a dominant market position. Here, the Draft proposes to add a list of factors relevant for "business operators in the internet industry": network effects, economies of scale, lock-in effects, and data processing and handling capacities. Against the background of the current wave of antitrust enforcement actions against internet businesses globally, it is understandable that SAMR would want to include that provision. However, enforcement priorities change over time, hence the focus on a single sector of the overall economy in the law itself looks misplaced.

In the administrative monopolies area, as noted, the key changes are to bring the FCRS within the AML framework and streamline the procedure. As part of that change, SAMR would gain the right to conduct an investigation directly against the infringing government body. Other changes in the administrative monopoly chapter of the AML are minor in nature.

In addition to the chapters of the AML which comprise substantive law, two chapters deal with procedural issues – investigations against anti-competitive agreements and abuse of dominance, as well as legal liability for breach of its provisions.

The chapter on investigations against monopoly agreements and abuse of dominance remains largely intact. The three major changes proposed in the Draft include:

- SAMR can enlist the support of the police "when necessary." Looking at past enforcement cases, this may refer to situations where a company forcefully resists a SAMR investigation.
- SAMR proposes to be given the power to revoke a merger control decision if the merging parties have provided false or inaccurate information.
- The Draft provides that SAMR is entitled to run an investigation against government bodies directly, which in turn are under an obligation to cooperate with SAMR.

In the chapter on legal liability, there are various proposals to strengthen sanctions, as noted above. In addition, the Draft adds a sentence that anti-competitive conduct amounting to a crime is to be investigated under criminal law provisions. At the moment, China's Criminal Law only prohibits certain types of bid-rigging and "forced transactions" (in almost a literal way). The way it is formulated, however, the sentence in the Draft could be read as a statement of intent. Perhaps this points to the fact that there could be amendments made to the Criminal Law in the future that will add further kinds of anti-competitive conduct to the list of criminally sanctionable antitrust offenses.

Conclusions

The Draft is the first set of proposed amendments of the AML since the law came into force over 11 years ago. That is actually quite a long time, given the volume of cases handled, and the changes to the Chinese economy that have taken place in the interim.

In line with the professed goals of the drafters, the Draft only proposes punctual changes, not a radical overhaul. Key changes proposed in the Draft are to bring the FCRS into the AML framework, a strengthening of all types of sanctions, and a revision to merger control rules which could potentially make it more difficult to predict whether a transaction is reportable and if so how long it will take to obtain clearance. It is one thing to toughen up the punishments for violations to bring them in line with other regimes around the world and make them more of a deterrent. But it is not particularly helpful for businesses to face increased fines for failure to file when it is less clear which transactions are required to be reported in the first place, or what the thresholds are likely to be, and given the impact of merger control filing on the timing for closing of a transaction to have less clarity around the end point for the merger control review process.

After conclusion of the stakeholder consultation period on 31 January, SAMR is to review the comments submitted and consider them for an amended draft. Then we can either expect SAMR to release a new version of the draft amendment for public comment or send a draft to the State Council as the next step in the normative process. Once the State Council is satisfied with the proposed set of amendments, it should make public its own version and, subsequently, submit the proposal to the Standing Committee of the National People's Congress to commence the formal legislative process. If you would like to obtain an in-house Hogan Lovells translation of the draft AML amendment, please contact us.

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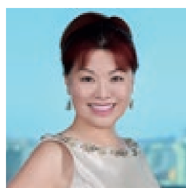

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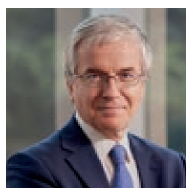

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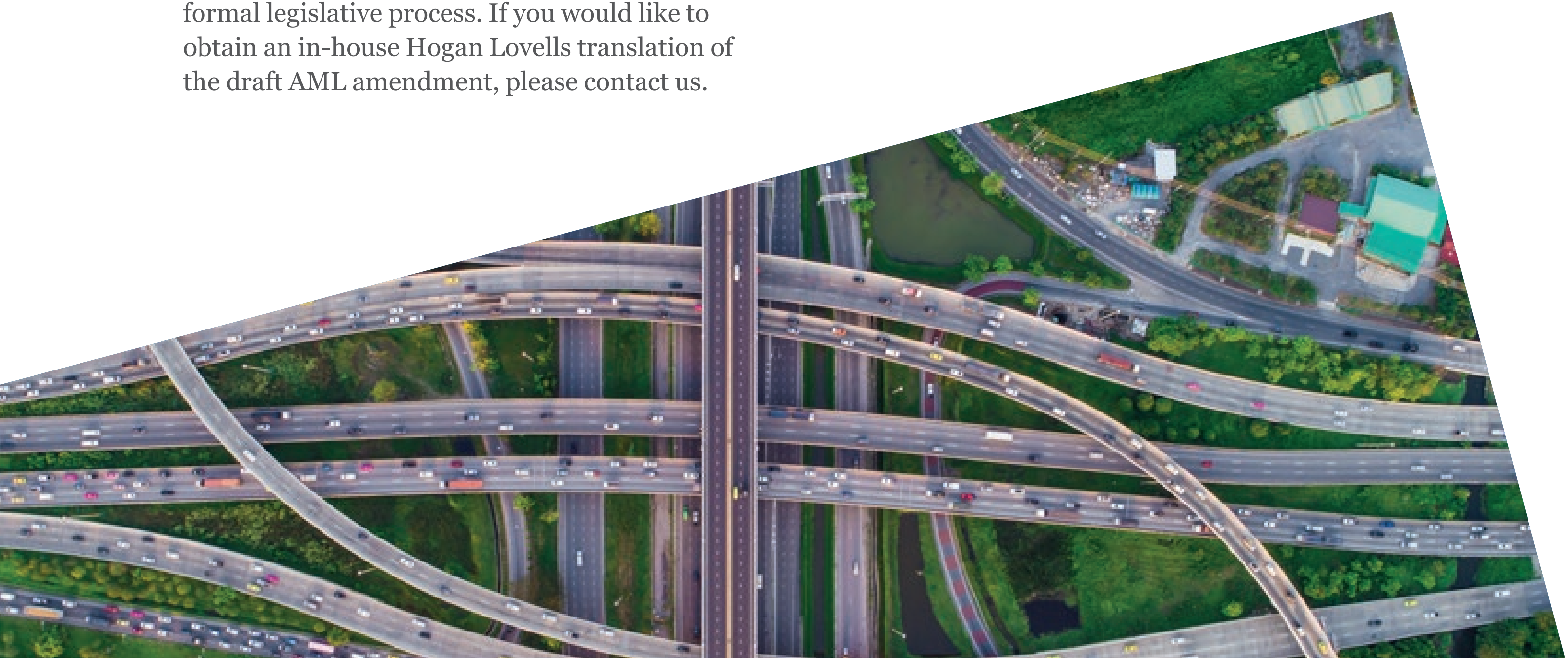

Industrial policy strikes again: Germany announces further tightening of Foreign Investment Control rules

For M&A transactions in Germany and beyond, Foreign Investment Control screenings have become an indispensable standard element to assess when structuring deals and planning for regulatory review. Similarly to merger control, acquirers and sellers need to consider the impact of the increasing number of jurisdictions that might want to review their proposed transaction. In the last few years, Germany has been at the forefront of the EU Member States concerning, in particular, the screening of Chinese investments, although the number of notified acquisitions by US acquirers has also increased. And there is more to come:

On 30 January 2020, the German Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie – BMWi*) issued a draft bill further tightening regulations on Foreign Direct Investment (FDI) into Germany (the draft is publicly available in German here). Specifically, the current draft bill concerns a reform of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz – AWG*) in three main areas:

- The reform **tightens the standard of review** as the threshold for the BMWi to take action is lowered to encompass all transactions *"likely to affect public order or security in Germany"*. So far, actual endangerment of public order or security is required for the BMWi to take action. In line with the EU FDI Framework Regulation (EU) 2019/452 of 19 March 2019 (publicly available here), the draft bill **expands the scope of FDI review** to include considerations of "public order or security of other Member States or projects or programmes of Union interest" and not only considerations of public order or security of Germany.
- The **scope of the stand-still obligation** for closing shall in the future extend to all transactions subject to mandatory review in Germany. So far, only so-called sector-specific transactions, mainly in the sector of defence, are subject to the stand-still obligation.
- Also, the reform establishes **a contact unit for the cooperation mechanism** at the BMWi to exchange with the European Commission as well as other Member States on foreign investments undergoing screening in Germany. This is foreseen in the EU FDI Framework Regulation.

Further to the amendments foreseen to the AWG, the Federal Government also intends to amend the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung – AWV*). The AWV specifies the provisions of the AWG in practice. For instance, the operation of satellite-based earth remote sensing systems will be included in the catalogue of security-relevant activities of targets subject to mandatory review. Furthermore, the Federal Government intends to add "***critical technologies***" to the catalogue.

Both the amendment of the AWG, as well as the amendment of the AWV, are planned to become **effective in October 2020** when the EU FDI Framework Regulation will fully enter into force. All transactions signed after this date will be subject to the new rules. The changes apply to all direct or indirect acquisitions of German targets by non-EU acquirers. Currently, trade associations are invited to comment on the draft and companies should make use of this channel to let the government know about their views.

Below we discuss some aspects of the tightened rules in more detail.

Stricter standard of review – transactions "likely to affect" security interests

The draft tightens the legal standard for the substantive review to all transactions involving a German target which are "likely to affect public order or security" in Germany. According to the draft's reasoning, *"[t]his emphasises in particular the necessary forward-looking approach which is inherent in investment screening anyway: an impairment which has not yet occurred but which may occur in the future as a result of a critical acquisition is to be prevented."* Hence, this significantly lowers the degree of risk enabling the Federal Government to intervene. In the future, the Federal Government will already have the power to prohibit a transaction or impose commitments if the transaction is *"likely to affect"* security interests. So far, this power is limited to transactions actually endangering public order or security in Germany.

The new standard corresponds to the wording used by the EU FDI Framework Regulation. However, Member States are not obliged to apply this strict standard. The expansion of the standard of the review can therefore rather be seen as a deliberate tightening of FDI regulation by the Federal Government.

Expanded scope of review – EU interests and "critical technologies"

FDI review in Germany will, in the future, not only encompass German security interests, but also take into account whether a transaction *"affects public order or security of other Member States or projects or programmes of Union interest"*. The cited projects and programmes are set out in the EU FDI Framework Regulation's Annex and include Galileo, Copernicus and Horizon 2020.

Additionally, the BMWi is very clear about its changed, wider general approach to FDI screenings. This is supposed to be reflected in an upcoming amendment of the AWV taking place parallel to the changes to the AWG. While FDI screenings in Germany were initially only intended to protect national security, critical infrastructures and public supplies, the reasoning of the draft states that the relevance of FDI review now goes beyond that. Expressly, the *"technological sovereignty of the Federal Republic of Germany"* shall be secured.

The draft specifically refers to "critical technologies" as defined in the EU FDI Framework Regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. Additionally, the operation of satellite-based earth remote sensing systems will be included in the catalogue of especially security relevant activities. This means that transactions in all of the aforementioned areas will become subject to mandatory notification and review.

Expansion of stand-still obligation to all listed industry areas

The former is particularly relevant as the reform also foresees a significant procedural change to the mandatory FDI review in Germany. So far, the catalogue of industry areas listed as especially security relevant only requires mandatory FDI notifications to the BMWi without a direct impact on the deal time-line. In the future, the parties to such transactions will additionally face stand-still obligations to have their transaction cleared by the Federal Government before closing a deal. The relevant industry areas will be critical infrastructure, telecommunications/surveillance, provision of cloud-computing services, telematics, media as well as the newly added critical technologies and earth remote sensing systems.

So far, only so-called sector-specific transactions (mainly in the defence area) have been subject to this stand-still obligation. Now, transactions in all areas expressly listed in the AWV subject to non-sector specific review will also be provisionally invalid prior to clearance by the Federal Government. All other transactions, which are solely subject to the blanket clause and not expressly listed, remain subject to ex officio reviews by the BMWi or voluntary notifications by the parties to a transaction and the parties may close without having to await clearance.

Context of the reform: German and EU Industrial Policies

Regarding the practice of FDI review in Germany, the stricter standard of review and the wider general approach to FDI screenings regarding the scope of review largely reflect the practice the BMWi has already increasingly been following in screening procedures. FDI screenings have recently mostly concerned targets in the areas of mechanical engineering, IT and communication as well as automotive suppliers and companies holding export control licenses, which could be deemed active in critical technologies. Furthermore, the BMWi has put a particular focus on Chinese investors and showed a tendency to interpret the provisions of AWG and AWV very broadly, thereby anticipating the planned reform. In essence, the reform does not come as a surprise.

In a broader context, the reform is not a Germany-specific development, but follows an ongoing trend in major Western economies like the US, Japan as well as the UK, France, Spain and others in Europe to tighten Foreign Investment Control. In Germany, it is the third significant reform of FDI regulations within less than three years – while the last one has only taken place in December 2018 (see here for our coverage of the 2018 reform and here for our coverage of the 2017 reform). Additionally, the BMWi has made it very clear in its Industrial Strategy 2030 released in November 2019 (publicly available here, see our coverage of the largely similar draft here) that it deems tightening of FDI regulations as crucial for future economic development in Germany – an entire chapter is dedicated to "Maintaining technological autonomy". Other envisaged measures include tightening conditions on technology transfer to third countries, the German state serving as a moderator for private-sector players to step in as "white knights" in sensitive transactions involving German targets and even the German state setting up structures to acquire shareholdings in sensitive companies itself as a last resort.

The reform also reflects a European trend. The EU Screening Regulation enacted in March 2019 (see here for our latest coverage) established a common structure for the screening of FDI into the EU. The Regulation was based on a joint initiative by France, Italy and Germany, while the further convergence between the French and German approach to interventionism and FDI screenings became clear with the publication of the *"Franco-German Manifesto for a European industrial policy fit for the 21st Century"* in February 2019 (publicly available here, see here for our coverage). In line with this development, the upcoming EU Industrial Policy also foresees tighter trade measures. *Inter alia,* the EU is purportedly planning a "new instrument" to tackle the impact of foreign companies supported by government subsidies on European markets. In January 2020, the U.S., the EU and Japan released a joint statement outlining plans to widen actions against state-owned intervention (publicly available here). This reflects the widespread and increasing concerns about Chinese investors in Western economies. With Germany taking over Presidency of the Council of the EU in the second half of 2020 and the departure of the UK from the EU, further developments – and likely further tightening – in the area of FDI regulation on EU level are possible.

Key Takeaways

The draft bill and envisaged further changes to German FDI regulation will have a significant impact on future M&A deals directly or indirectly involving German entities or assets. Parties to such transactions will increasingly have to take German and EU FDI regulations into account – as has long been the case for CFIUS in the US, and merger control globally. This is further emphasised by the stricter standard of review and widened general approach by the BMWi to initiate FDI screening procedures. The development is underlined by the steadily increasing number of screening procedures over the last decade and will require parties, specifically acquirers, to start carrying out FDI assessments and even to consider voluntary notifications to the BMWi for transactions which appeared to raise no FDI concerns in the past.

Planning and structuring future deals will have to reflect these substantive considerations, but also the changing procedural elements of German FDI review. Mandatory notifications and stand-still obligations are now foreseen for a number of industry segments – with the number of concerned areas likely growing in the future. This along with the broader substantive assessment will impact the timing for concerned deals. Implementation of the EU Screening Regulation with its cooperation mechanism between the European Commission and Member States for FDI screening procedures will likely further impact both the timing of the procedures and the substance of the assessment. The latter can already be seen in the expanded scope of FDI review in Germany regarding other Member States and EU projects.

Generally speaking, government intervention under foreign investment rules is already much harder to predict than under the tried and tested merger control regimes – not only in Germany. The German Federal Minister for Economic Affairs, Peter Altmaier, tried to downplay the reform, simply stating: *"We want to protect our security interests in a more forward-looking and comprehensive manner."* However, criticism from industry representatives followed promptly. The head of the leading German industry association BDI, Dieter Kempf, concluded: "Great uncertainties arise for investors and companies."

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Air cargo defendant extradited to stand trial

The Antitrust Division (Division) announced Monday that Maria Christina "Meta" Ullings, a Dutch national and former executive for Martinair Holland N.V., was extradited from Italy to the United States after being apprehended by Italian authorities in Sicily in July 2019.[1] Ullings was indicted nearly 10 years ago as part of the Division's prosecution of a price-fixing conspiracy in the air cargo industry. Ullings arrived in the United States on 10 January and made her initial appearance in U.S. District Court on 13 January. Ullings' extradition represents the second time that a foreign national has been extradited for solely criminal antitrust charges.

Over the last decade, the Division has increasingly flexed its extradition powers. To successfully extradite a fugitive to the United States for antitrust violations, there must be both an existing extradition treaty and "dual criminality." In most cases, the presence of an extradition treaty can be assumed as the United States has such treaties with all but a handful of nations.[2] Therefore, the Division's ability to pursue extradition in a criminal antitrust case usually hinges on the existence of "dual criminality," or whether the alleged offense is a criminal violation in both countries. Historically, very few countries had criminal cartel laws on their books, sharply limiting the Division's ability to pursue extradition in most fugitive cases. In the last 10 years, however, there has been an unprecedented boom in the criminalization of cartel conduct. In 1990 only 13 countries had laws that criminalized any cartel conduct. Today, however, that number has more than doubled and the criminalization of cartel conduct is clearly trending upwards.[3] As more nations adopt criminal sanctions for cartel conduct, the risk of extradition grows accordingly.

Of course, issues arise in assessing dual criminality. Although cartel prohibitions are increasingly prevalent globally, not all criminal antitrust laws are identical. For example, while more than half of the European Union member states and the BRICS nations: Brazil, Russia, India, China, and South Africa have criminalized cartel conduct in some form, several of these nations provide criminal sanctions only for bid-rigging.[4] As a result, in these jurisdictions, unless the Division has alleged bid-rigging as part of the offense, there would be no dual criminality and accordingly no extradition. Finally, while dual criminality may exist in more and more cases, the nationality of the defendant may prevent or reduce the chance of extradition. Some nations, such as Australia, Brazil, Japan, and South Korea, limit the extradition of their citizens by treaty or statute.[5] Of course, this limitation on extradition of citizens from their home countries does not protect individuals traveling in or between foreign nations as shown by the fact that Italy arrested and extradited Ullings, a Dutch citizen. Over the last 10 years, the Division has successfully extradited at least six other individuals in criminal antitrust cases. Some notable examples include:

- Ian Norris: A British national indicted for price-fixing and obstruction of justice in 2003. Initially, Norris was to be extradited for both price-fixing and obstruction of justice, but in March 2008 the House of Lords ruled that he could not be extradited for price-fixing because it was not a criminal offense in the United Kingdom at the time the alleged conduct occurred.[6] Norris was extradited for obstruction of justice in March 2010 and convicted in July 2010.

1 Press release, former Air cargo executive extradited from Italy for price-fixing, United States Department Of Justice (13 January 2020): available here.

2 The United States has bilateral extradition treaties with over 100 countries. See CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND CONTEMPORARY TREATIES 35-40 (2016), available here.

3 In 2010 the International Competition Network put the number at 20; recent scholarly work puts the number at approximately 30. See Gregory Shaffer, Nathaniel H. Nesbitt, and Spencer Weber Waller, Criminalizing Cartels: A Global Trend?, in research handbook on Comparative Competition Law (John Duns et al. eds. 2015) at 5: available here.

4 See id. at 3.

5 Id. at 4.

6 Today, the United Kingdom does consider antitrust violations to be a criminal offense. See Christopher Thomas & Gianni De Stefano, Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance, MLEX AB EXTRA (30 September 2016): available here.

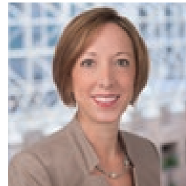
- David Porath: An Israeli national indicted for bid-rigging, tax fraud, and false subscription in 2010. Porath was arrested in Israel in November 2010 and consented to voluntary extradition in January 2012 after an Israeli magistrate declared him extraditable. He returned to the United States in February 2012 and pled guilty to the indictment in July 2012.
- Romano Pisciotti: An Italian national indicted for price-fixing, bid-rigging, and market allocation in August 2012. Pisciotti was placed on Interpol Red Notice and subsequently arrested in Germany in April 2013. He was extradited to the United States nine months later and subsequently pled guilty to a one-count indictment. Pisciotti's case was notably the first time that the Division successfully extradited an individual for strictly antitrust offenses.[7]

The current administration has emphasized its commitment to pursuing extradition for antitrust offenses. Makan Delrahim, assistant attorney general for the Antitrust Division, remarked that Ullings' extradition "demonstrates that those who violate U.S. antitrust laws and seek to evade justice will find no place to hide…With the cooperation of our law enforcement colleagues at home and around the world, the Division will aggressively pursue every avenue available in bringing price fixers to justice." Delrahim's principle deputy, Andrew Finch, similarly noted the importance of extraditing antitrust offenders in a speech in Seoul in May 2018.

Defendants, therefore, should not assume that they are beyond the reach of the Department of Justice simply because they reside abroad nor should defendants have a false sense of security with the passage of time as Ullings' case shows.

7 Three other individuals – John Bennett, Paul Thompson, and Yuval Marshak – have been extradited for fraud offenses in joint investigations between the Antitrust Division and the Criminal Division.

Contacts



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FTC uses "study authority" to review past non-HSR acquisitions

On 11 February 2020 Federal Trade Commission (FTC) announced that it has issued Special Orders to five large technology firms requiring them to "provide information about prior acquisitions not reported to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act."[1] Two FTC Commissioners – one Republican and one Democrat – issued a separate statement calling for similar studies of non-HSR transactions in healthcare and other industries.[2]

The agency could use its learnings from the study to modify HSR reporting thresholds, to open law enforcement investigations, or for other research purposes.

The agency issued the Special Orders pursuant to Section 6(b) of the FTC Act, which "authorizes the Commission to conduct wide-ranging studies that do not have a specific law enforcement purpose."[3] The Special Orders require the technology companies to provide information to the FTC about transactions between 1 January 2010 and 31 December 2019 that were not reportable under the HSR Act.[4] The information "will help the FTC deepen its understanding of large technology firms' acquisition activity, including . . . whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors."[5] The FTC specifically requested information outlining the terms, scope, structure, and purpose of these transactions, including documents related to corporate acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies, post-employment covenants not to compete, and information related to post-acquisition product development and pricing.

A separate joint statement by Commissioners Christine Wilson and Rohit Chopra called for the Commission to analyze non-reportable deals in the healthcare industry as well, pointing to what they termed "stealth consolidation" in dialysis facilities, pharmaceuticals, and hospitals.[6] Wilson and Chopra also reiterated their request that the Commission prioritize 6(b) studies that explore consumer protection issues related to the privacy and data security practices of technology companies, specifically with respect to "how content curation and targeted advertising practices impact data collection, use, and sharing, and how the monetization of data impacts the creation and refinement of algorithms that drive content curation and targeted advertising practices."[7]

1 Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020) available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies?utm_source=govdelivery. The orders were sent to Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft, Corp.

2 Federal Trade Commission, Statement of Commissioners Christine S. Wilson and Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (11 February 2020), available at https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

3 Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020).

4 Under the HSR Act, certain acquisitions of assets, voting securities, or interests in noncorporate entities are subject to preclosing filing (with the U.S. antitrust agencies) and waiting period requirements if the applicable jurisdictional thresholds are satisfied and no exemption applies. The HSR jurisdictional thresholds are revised based on changes to the U.S. gross national product. The latest HSR threshold adjustments published in January 2020 are summarized here.

5 Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020).

6 Federal Trade Commission, Statement of Commissioners Christine S. Wilson and Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (11 February 2020), available at https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platformcompanies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

7 Id.

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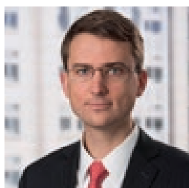

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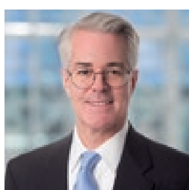

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New sections of the Competition Amendment Act are now operational

Following the enactment of the Competition Amendment Act during 2019 and the subsequent promulgation of a number of the provisions, the latest tranche of sections of the Competition Amendment Act came into operation on 13 February 2020. The newly operational sections include buyer power provisions, price discrimination provisions, as well as sections relating to confidentiality and the disclosure of information, and the section relating to administrative penalties for the buyer power and price discriminations provisions. The regulations relating to buyer power and price discrimination have also come into operation.

The newly operational provisions amend Section 8(4) of the Competition Act introduce buyer power provisions, stating that a dominant firm in a designated sector may not impose unfair prices or other trading conditions on suppliers that are small and medium businesses ("SME") or firms controlled by historically disadvantaged persons ("HDP"). A dominant firm can't circumvent this by refusing to purchase from a supplier which is an SME or an HDP. If there is a *prima facie* case against the dominant firm, it must show that the price or other trading condition is not unfair, or that it has not avoided purchasing goods or services from the SME or HDP supplier.

The corresponding Buyer Power regulations designate sectors in which dominant firms are prohibited from requiring or imposing unfair prices or other trading conditions on a supplier. These sectors include the grocery wholesale and retail sector, the agro-processing sector, and the ecommerce and online services sector. The regulations also set out the relevant factors and benchmarks for determining whether prices and other trading conditions imposed are unfair. The regulations apply to SMEs or HDPs that supply 20percent or less of the purchases of the dominant buyer for the relevant goods or services.

Section 9 of the Competition Act relates to price discrimination by a dominant firm as a seller rather than a buyer. In terms of the amendments to this section, it is prohibited for a dominant firm to engage in any price discrimination that substantially prevents or lessens competition, or impedes the ability of SMEs or HDPs to participate effectively. A dominant firm may also not refuse to sell (or now avoid selling) goods or services to an SME or HDP purchaser. It won't be considered price discrimination if the dominant firm is able to show that the difference in price relates to a reasonable allowance for differences in cost associated with manufacturing, distribution, sales, promotions or delivery as a result of the location of the purchaser, method of deliver to the purchaser, or the quantities sold to the purchaser.

The Price Discrimination regulation aims to provide benchmarks for determining which firms constitute SMEs or HDPs for these purposes, and whether or not a dominant firm's action is price discrimination that impedes the participation of SMEs or HDPs. The regulations apply to SMEs or HDPs that purchase 20percent or less of the relevant goods or services of the dominant seller. Factors that will be considered include the duration and timing of the price differential, whether or not the differential price will impede the effective participation of an SME or HDP, and whether or not it will decrease investment by the purchaser.

Section 44 of the Competition Act now allows the Minister of Trade and Industry access to any confidential information submitted to the Competition Commission or the Competition Tribunal. It has also extended the powers of the Commission to allow the Commission to determine whether or not information is confidential, a power that has previously only been held by the Tribunal. The owner of the confidential information may refer any decision relating to confidentiality by the Commission to the Tribunal for final determination. Section 45 of the Competition Act which relates to the disclosure of confidential information has been brought in line with the amendments to Section 44.

Given that the Competition Amendment act abolished the "yellow card" provisions of the Competition Act for certain first time offenders, any violators of the buyer power or price discrimination provisions, even if a first time offender, may face an administrative penalty of up to 10percent of the firm's annual turnover. Furthermore, a repeat offender faces a possible penalty of up to 25percent of its annual turnover.

We have now seen the coming into force of some of the more controversial changes to the Competition Act, and it will be interesting to monitor the Commission over the next few months to see how it proceeds with these amended sections and extended powers.

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Key takeaways from the FTC's non-compete workshop

On 9 January 2020 the Federal Trade Commission (FTC) held a public workshop in Washington DC to assess whether it should "promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts."[1] Non-compete clauses are provisions in employee contracts restricting them from working for a competing employer for some period of time after their employment ends.[2]

The workshop focused on the growing use of non-compete agreements by employers across industries, whether the use of these agreements is anti-competitive, and what authority the FTC has to regulate the use of these agreements in the labor markets.

The FTC is now seeking further public comments, due on 10 February 2020. Below we discuss the key takeaways.

The panel agreed that there is no justification for non-competes restricting low-wage and low-skill workers

The panelists were largely in agreement that there is no legal or business justification for the use of non-compete agreements for low-wage and low-skill workers (such as fast food franchise employees). Citing evidence that such agreements result in depressed wages, diminished labor mobility, and disproportionally affect workers who lack bargaining power in employment negotiations, there was broad support for the FTC to – at a minimum – regulate or ban the use of non-compete agreements as they apply to low-wage workers.

The effect of non-competes on other workers is less clear

In contrast to the effects on low-skill and low-wage workers, studies show that non-compete agreements may benefit other types of employees, such as CEOs[3] and physicians.[4] The panelists agreed that more research needs to be conducted to assess the effects of the widespread use of non-compete agreements by companies across various sectors.

Non-competes are prevalent even in states where they are unenforceable

The rate of use of non-compete agreements in states where they are unenforceable (such as California) is similar to the rate of use in states where they are legal. The panelists were unable to fully explain this phenomenon, but stated that it could be partly due to the fact that many workers – especially low-wage workers – are unfamiliar with relevant state laws governing their employment agreements and are unable to hire counsel to advise them of their rights.

1 Federal Trade Commission press release, FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts (5 December 2019) available at https://www.ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts.

2 Non-compete clauses are distinct from "no-poach" agreements, in which competing employers agree not to hire each other's workers. No-poach agreements, wage-fixing agreements, labor market definition, and labor monopsony in merger enforcement were the subject of a companion workshop hosted by DOJ in September 2019. Public Workshop on Competition in Labor Markets (23 September 2019) available at https://www.justice.gov/atr/public-workshop-competition-labor-markets.

3 CEOs often enter employment negotiations with significant bargaining power, and can negotiate an increased salary in exchange for agreeing to the non-compete provision. From the employer's perspective, the non-compete provision allows the employer to demand better CEO performance because terminating the CEO does not risk the potential economic harm that could result from a terminated CEO immediately joining a competitor.

4 Studies show that noncompete agreements allow a medical practice to protect its patient relationships, one of its most valuable assets. If a doctor leaves a practice where a noncompete agreement is in place, she is more likely to refer her patients within the practice, resulting in increased earnings for the remaining physicians in the practice.

The FTC's authority to address non-competes through rule-making is unclear

FTC Commissioner Rebecca Slaughter stated her strong support for the FTC to undertake a rule-making endeavor to provide a national standard for regulating the use of non-compete agreements. Other speakers debated the FTC's rule-making authority in this area. FTC Commissioner Noah Phillips in particular expressed concern that an FTC rule regulating unfair methods of competition may implicate a fundamental question of constitutional separation of powers regarding Congress' ability to delegate legislative powers to administrative agencies.[5]

Alternatives to a ban on non-competes may be appropriate

Potential alternatives to a national standard banning employee non-competes were also discussed. One possibility is limiting the use of non-compete agreements – such as requiring employers to issue written notice, providing employees with the right to consult counsel, limiting the geographic scope of an agreement, and imposing a maximum duration that an agreement is enforceable. Another alternative is to have the FTC issue a policy statement regarding the use of employee non-competes, thereby avoiding the procedural hurdles inherent in the rule-making process.

Next steps

Most of the panelists appeared to believe that a per se ban on non-compete agreements would be difficult for the FTC to justify. The economists on the panel were mostly in agreement that more research is necessary to determine whether the potential anti-competitive effects of non-compete agreements (e.g., stagnating wages, lack of mobility in the labor market, and limiting employees' bargaining power) outweigh any potential benefits (e.g., incentivizing employers to invest in training, protecting trade secrets, and preserving the freedom to contract). It was also suggested that the FTC analyze the disparate effects on workers and employers that result from the variations of non-compete laws across states.

The FTC is now seeking public comment on a number of questions, including:

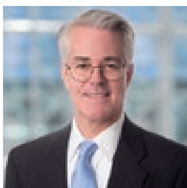
- What additional economic research should be undertaken to evaluate the net effect of non-compete agreements? Should additional economic research on the empirical effects of non-compete agreements focus on a subset of the employee population? If so, which subset?
- What impact do non-compete clauses have on labor market participants?
- What are the business justifications for non-compete clauses?
- Do employers enforce employee non-compete agreements? How routine is such enforcement?

6 Federal Trade Commission, Prepared Remarks of Commissioner Noah Joshua Phillips (9 January 2020) available at https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf.

- Are there situations in which non-compete clauses constitute an unfair method of competition (UMC) or an unfair or deceptive act or practice (UDAP)? How prevalent are these situations?
- Should the FTC consider rule-making to address the potential harms of non-compete clauses, applying either UMC or UDAP principles?
- What should be the scope and terms of such a rule?
- Is state law insufficient for addressing harms associated with non-compete clauses? Is federal law insufficient?
- What is the statutory authority for the commission to promulgate such a rule?
- Should the FTC consider using other tools besides rule-making to address the potential harms of non-compete clauses, such as law enforcement, advocacy, or consumer/industry guidance?[6]

The deadline for submitting public comments was 10 February 2020.

Contact



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6 FTC, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (9 January 2020) available at https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

Will introducing payments for antitrust whistle-blowing in China prove to be a compliance game changer?

On 19 November 2019, the State Administration for Market Regulation ("SAMR") posted a draft of the Interim Measures on Rewards for Complaints Against Significant Illegal Conduct in the Market Regulation Field ("Draft Reward Measures") on its website for public comment.

The Draft Reward Measures build on a series of similar rules issued by SAMR's predecessor bodies and some local authorities in the fields of counterfeiting, product safety, pricing conduct and intellectual property. The difference here is that rather than focusing on specific areas like these prior rules, the Draft Reward Measures propose to establish a unified system for providing financial incentives to whistle-blowers who come forward to report various types of significant violations of laws, administrative regulations and rules, the enforcement of which falls within SAMR's jurisdiction, including serious antitrust offences.

Based on the explanatory notes for the Draft Reward Measures, their goal is to expand coverage of prior rules, increase efficiencies and reduce administrative costs, provide more substantial incentives, and set out a more detailed procedure for whistle-blowers to obtain rewards. The Draft Reward Measures are clearly meant to apply only to reports of "significant illegal conduct," not any kind of illegality.

The Draft Reward Measures define "significant illegal conduct" as conduct which amounts to a crime or which could be sanctioned by ordering the suspension of operations, revocation of permits or business licence, or "fines of relatively large amounts." In addition, the Draft Reward Measures explicitly stipulate that "violations of competition law" fall within their scope of application.

Of course, violations of the Anti-Monopoly Law ("**AML**") by market participants can be sanctioned by fines of between 1-10% of sales revenues – which would certainly appear to qualify as "fines of relatively large amounts."

The Draft Reward Measures put forward detailed procedures for whistle-blowers to report illegal conduct to SAMR. Importantly, only natural persons qualify. Although they do not explicitly say so, the Draft Reward Measures seem mainly designed to allow employees to report wrongdoing within their companies. In contrast, those directly harmed by the reported conduct (like a buyer of a cartelized product) cannot use the new whistle-blowing system. Similarly, whistle-blowing by the person committing the infringement is not accepted. This sets the whistle-blowing procedure apart from the leniency program under the AML, where participants in unlawful agreements are allowed to self-report (except for ringleaders).

Under the Draft Reward Measures, a whistle-blower can report to SAMR in writing, by telephone or email, either disclosing his or her identity or on an anonymous basis (as long as he or she remains contactable). A complaint needs to feature some basic information, like the name of the alleged lawbreaker; the specific facts underlying the illegal conduct or at least some "clues"; and key evidence in that regard. In addition, the information in the complaint must not already be in SAMR's hands, in order to qualify for a reward, and must be sufficient to allow the authority to close an investigation and impose sanctions on the perpetrator.

The Draft Reward Measures classify rewards into three levels. The first-level reward requires the whistle-blower to put forward a detailed description of the facts; direct evidence; a perfect match between the allegations in the complaint and the sanctioned conduct; and a finding of "very significant illegal conduct or a crime." A second-level reward will be granted if the complaint describes the facts; provides direct evidence; and the allegations and sanctioned conduct perfectly match up. For a third-level reward, the provision of just basic facts; "related" evidence; and a basic match between the allegations and the sanctioned conduct is sufficient.

The rewards for whistle-blowers are 5%, 3% and 1% of the amount of the fine and repayment of unlawful gains imposed on the perpetrator for the first-level, second-level and third-level rewards,

respectively, with RMB 5,000, 3,000 and 1,000 as minimum amounts guaranteed for the whistle-blower. However, the Draft Reward Measures also set a maximum amount of RMB 1 million (around USD 142,000), which can be doubled to RMB 2 million for cases that cause significant harm to society, so the amounts are effectively capped.

The Draft Reward Measures also lay out a specific procedure for SAMR to assess complaints filed and grant rewards to whistle-blowers. A key feature of that procedure is that SAMR officials are subject to strict disciplinary measures for maintaining the confidentiality of the whistle-blower's identity. This is presumably to prevent companies which have been targeted from outing the whistle-blower and/or seeking revenge.

The public consultation period allowing third parties to comment on the Draft Reward Measures expired on 28 November 2019. If enacted in a similar form to the current draft, the Draft Reward Measures may provide a significant boost to antitrust enforcement in China. Given the generally high level of fines imposed under the AML and the fact that certain antitrust offences arguably are likely to have a significant societal impact, it seems quite realistic for whistle-blowers to be able to obtain the maximum amounts available under the Draft Reward Measures (RMB 2 million)

Conclusion

For companies doing business in China, the likelihood of having employees report allegedly illegal conduct to SAMR or its local offices can be expected to increase substantially, which puts pressure on companies to comply, which is generally a good thing. However, this incentivising of whistle-blowers may be a double-edged sword with, for example, companies coming under pressure (potentially, blackmail) from, say, disgruntled terminated employees to pay increased severance settlements to avoid a whistle-blower report on a purported breach of law which is unrelated to their employment. It is also possible to envisage a scenario with multiple current or ex-employees taking advantage of the internal settlement reached with one potential whistle-blower to obtain individual settlements relying on the same facts from the same company.

In any event, investigations launched on the back of whistle-blower complaints are likely to eat up management time and energy. Companies in China could be forgiven for feeling browbeaten at present, with additional compliance pressure from China's fast developing social credit system, leading to significant additional costs at a particularly challenging time for business.

Only after the Draft Reward Measures have been enacted and implemented over a certain period of time will we know the true impact and whether they have indeed become a "game changer" for antitrust compliance in China. In any event, companies would be well advised to upgrade their compliance programs and strengthen company internal whistle-blowing channels in order to 'cut this off at the pass' and mitigate the risk of getting bogged down in costly and lengthy antitrust investigations by SAMR.

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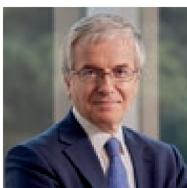

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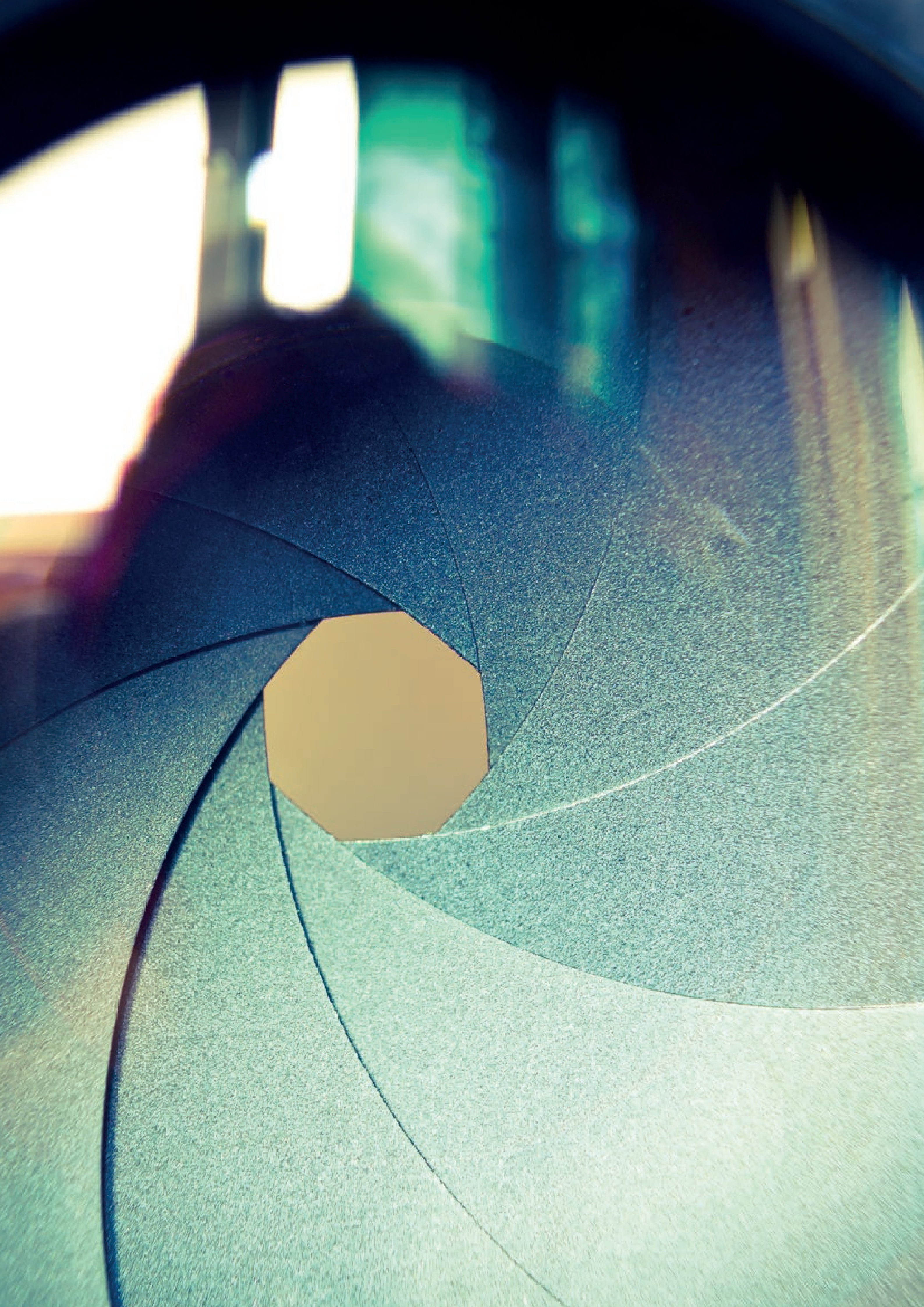

DOJ and FTC publish draft vertical merger guidelines

On Friday, 10 January 2020 the Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, the agencies) announced the publication of draft vertical merger guidelines that describe how the agencies currently review vertical mergers to determine whether the deals violate the antitrust laws. The draft vertical guidelines are intended to replace the DOJ's 1984 Non-Horizontal Merger Guidelines that have long been recognized as outdated. The updated draft vertical guidelines "are based on new economic understandings and the agencies' experience over the past several decades and better reflect the agencies' actual practice in evaluating proposed vertical mergers," according to Makan Delrahim, the head of the DOJ Antitrust Division.[1]

Public comments on the draft vertical guidelines are due in 30 days, by 11 February 2020.

SEA View, Article VII: October 2019

The draft vertical guidelines are intended to provide direction to the business community and antitrust practitioners with respect to the principal analytical techniques, practices, and enforcement policies the agencies will employ when assessing vertical mergers. The FTC and DOJ have highlighted the following topics as specific areas of focus:

- The definition of relevant markets and "related products," which are products supplied by the merged firm in an upstream or downstream market, and that affect competition in the relevant market.
- The analysis of potential anti-competitive effects resulting from vertical mergers, which may include both unilateral (e.g., foreclosure and raising rivals' costs and access to competitively sensitive information) and coordinated effects.
- The agencies' use of economic models to evaluate the potential effects of vertical mergers.
- How the elimination of double marginalization may mitigate or completely neutralize the potential anti-competitive effects of vertical mergers.

Reflecting an economic view that vertical mergers may cause anti-competitive harm particularly in concentrated markets, the draft vertical guidelines state that the agencies are "unlikely" to challenge a vertical merger if the merging parties' share in the relevant market is less than 20 percent and the related product is used in less than 20 percent of the relevant market. This threshold is not intended to be a "rigid screen to separate competitively benign mergers from anti-competitive ones," however. Instead, the threshold will allow the agencies to identify mergers for which it is necessary to analyze additional competitive factors when assessing the deal's adverse competitive effects. These factors include, but are not limited to, the actual effects observed in consummated mergers, direct comparisons based on experience, and evidence about the disruptive role of a merging party.[2]

1 Department of Justice press release, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment (10 January 2020) available at https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment.

2 U.S. Department of Justice and Federal Trade Commission Draft Vertical Merger Guidelines (2020) at 3-4, available at https://www.justice.gov/opa/press-release/file/1233741/download.

Relationship to 2010 Horizontal Merger Guidelines

The draft vertical guidelines should be read in conjunction with the agencies' 2010 Horizontal Merger Guidelines, and many provisions of the 2010 Horizontal Merger Guidelines are incorporated by reference. The draft vertical guidelines specifically state that the agencies will use the methodologies set forth in the horizontal guidelines with respect to defining relevant markets for vertical mergers and measuring shares and concentration in a relevant market (with the exception of relying on changes in concentration as an indicator of competitive effects from vertical theories of harm). The agencies also will evaluate claims of pro-competitive efficiencies using the same approach outlined in the horizontal merger guidelines. This includes requiring merging firms to substantiate efficiency claims "so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[3]

FTC commissioners split on support for the new guidelines

The FTC voted to publish the draft vertical guidelines along party lines, with the three Republican commissioners (Chairman Joseph Simons, Commissioner Noah Phillips, and Commissioner Christine Wilson) voting in support of the draft guidelines and the two Democratic commissioners (Commissioner Rebecca Slaughter and Commissioner Rohit Chopra) abstaining. Commissioners Wilson[4], Slaughter[5], and Chopra[6] each issued individual statements.

Commissioner Wilson's concurring statement characterizes the new guidelines as a "timely and comprehensive draft" that "explains and formalizes existing agency practices."[7] On the other hand, Commissioners Slaughter and Chopra both express concern that the draft guidelines do not appropriately capture the potential harm that may result from vertical mergers. Slaughter takes issue with the draft guidelines' "effective safe harbor" for merging parties with less than 20 percent market share. More generally, she questions the use of a market share-based threshold for assessing whether vertical mergers create competition

3 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

4 Federal Trade Commission Concurring Statement of Christine S. Wilson on the Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment (20 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

5 Federal Trade Commission Statement of Commissioner Rebecca Kelly Slaughter on the FTC-DOJ Draft Vertical Merger Guidelines (10 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

6 Federal Trade Commission Statement of Commissioner Rohit Chopra Regarding the Request for Comment on Vertical Merger Guidelines (10 January 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

7 Among other things, Commissioner Wilson encouraged public comments to address whether the guidelines' market share "safe harbor" should be higher, i.e., 30 percent.

concern. Chopra argues that the transformation of the modern U.S. economy – including increased concentration, the value placed on data in digital markets, and the growth of multisided platforms – call for a more fulsome revision of current vertical merger enforcement practices. He also advocates for a broader assessment of market power and firm dominance, and broader assessments of anti-competitive harm, including whether the merger would allow the merged firm to evade regulatory requirements, to "gain an upper hand in using government-granted benefits such as intellectual property rights," and to package products or link technologies in ways that deter entry.

The differing views among the FTC commissioners will likely be the subject of public comments that could affect the substance of the final published guidelines.

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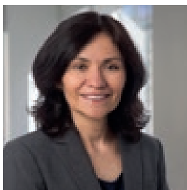

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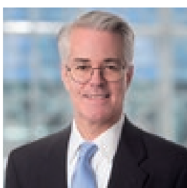

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The Court of Justice of the European Union provides clarifications on the assessment under competition law of pay-for-delay deals in the pharmaceutical sector

On 30 January 2020, the Court of Justice of the European Union (CJEU) issued its judgement on a request for preliminary ruling submitted by the UK Competition Appeal Tribunal (CAT) in a case concerning the long-standing dispute on the balances and limits between legitimate and anti-competitive settlement agreements.

The judgement of the CJEU largely reflects the Opinion of the Advocate General Kokott issued few days ago and touches upon three main interesting aspects, namely: i) whether originator and generic producers can be considered to be potential competitors where there is a dispute on the validity of the originator's patent and/or the existence of a violation of such patent by the generic drug, ii) whether a settlement agreement can be considered as infringing competition "by object" and iii) whether the same conduct can be said to violate, at the same time, the prohibition of anticompetitive agreements and the prohibition of abuses of dominance.

Background

In the early 2000s, GlaxoSmithKline (GSK) concluded three settlement agreements with three generic manufacturers, each having a short duration (2-3 years).

GSK was in fact the originator company of a paroxetine-based drug, whose exclusive protection expired at the end of 2000. By that time, however, GSK had obtained a number of secondary patents allowing it to maintain its position of sole supplier of paroxetine-based drugs in the UK.

During the same period, three generic manufacturers were seeking marketing authorizations in the UK for their generic versions of paroxetine.

In this context, a dispute arose between GSK and those three generic manufacturers regarding the latter's possible violation of GSK's secondary patents concerning the manufacturing process.

Subsequently, GSK and the generic manufacturers entered into agreements, the objective of which was to put an end to the patent disputes and whereby the generic manufacturers agreed – in return for payments by GSK of a certain amount of money – to postpone their entry onto the market for a certain period of time.

On 12 February 2016, the Competition and Markets Authority (CMA) adopted a decision finding that GSK held a dominant position in the market for paroxetine and had allegedly abused it by concluding the three settlement agreements. In addition, the CMA considered that two of the three agreements were anticompetitive. As a consequence, penalties were imposed on GSK and two of the generic manufacturers involved in the proceedings.

The companies then appealed the CMA's decision before the CAT and it is in this context that a preliminary ruling was submitted asking the CJEU to answer ten questions.

With its questions, the CAT essentially wished to understand whether an agreement to settle a medicinal product patent dispute may constitute a restriction of competition by object or by effect, and whether the conclusion of such agreement can also give rise to an abuse of dominant position.

The CMA found that one of the agreements was actually excluded from the scope of application of national rules on anticompetitive agreements due to the application of the special rules on vertical restraints which were applicable at the time and subsequently repealed.

Main takeaways from the preliminary ruling

Competitive relationship between the parties to the agreement.

For an agreement between companies operating at the same level of the production or distribution chain to be regarded as unlawful, the parties to such agreement must be in competition with each other, if not actually, at least potentially. This is why the first point considered by the CJEU is whether a patent holder and a generic manufacturer not yet in the market may be regarded as potential competitors, where there is an ongoing dispute between the parties regarding the validity of the originator's patent and/or the existence of a violation of such patent by the generic drug.

The position expressed in this respect by the CJEU largely reflects that of the Opinion of the Advocate General.

According to the CJEU, in establishing potential competition, account is to be taken of whether, at the time in which the agreement was concluded, the generic manufacturer had taken sufficient preparatory steps (e.g., marketing authorization applications, sufficient stock of generic products to enter the market) to enable it to enter the market in a reasonable period of time and therefore to exert pressure on the originator.

The second factor to be evaluated is whether such entrance is impeded by barriers to entry. In this respect, the CJEU observes that the existence of a patent does not amount to such an insurmountable barrier. As stated by the Advocate General in her Opinion, the CJEU considers that patent rights form part of the legal and economic context that competition authorities are expected to take into account when assessing the competition relationship between the parties. However, competition authorities are not expected to carry out their own assessment of the strength of the patent and/or of the chances of success of a dispute relating to the validity of such patent.

Following the Advocate General's Opinion, the CJEU indeed states that a dispute on the validity or infringement of a patent does not prevent the patent holder and the generic manufacturer from being considered as potential competitors. This applies also when an interim injunction has been granted prohibiting a generic manufacturer from entering the market since such injunction does not prejudice the merit of the action especially when it is granted in return for a cross-undertaking in damages agreed by the patent holder (like in the case at hand). The CJEU further points out that the existence of such a dispute between a patent holder and generic manufacturers should actually even be regarded as evidence of the existence of a potential competitive relationship between them.

The third factor to be considered when evaluating the competition relationship is the intention of the originator manufacturer to make a transfer value in favour of the generic producer to delay its entry into the market: the greater the transfer value offered, the stronger is the indication that a competitive relationship exists.

Anticompetitive nature of the agreement.

In assessing whether an agreement akin to the one at issue can amount to a restriction by object, the CJEU first makes clear that a settlement agreement – even when involving a value transfer from the originator manufacturer to a generic producer – cannot be considered, "*in all cases*", as a restriction by object.

However, when it appears from the settlement agreement that the transfer of value cannot be explained other than by the commercial interest of both parties not to engage in competition on the merits.

The assessment of the transfer value (either pecuniary or non-pecuniary) made between the parties is therefore critical for the purposes of evaluating whether the agreement is anticompetitive by object. The CJEU makes clear in that respect that the fact that the transfer of value exceeds the gains that could have been expected by the generic manufacturer if it had been successful in the patent proceedings is irrelevant: all that matters is that such transfer of values proves to be "*sufficiently beneficial to encourage the manufacturer of generic medicines to refrain from entering the market concerned*".

If the assessment of the settlement agreement does not reveal a sufficient degree of harm to competition, so that no restriction by object may be characterized, it is necessary to assess the effects of such an agreement. The CAT asked the CJEU to clarify whether the characterization of a restriction by effect necessarily requires a finding that, in the absence of the settlement agreement, the generic manufacturer would have probably succeeded in the patent proceedings or that a less restrictive agreement would have been entered into by the parties. The CJEU answers in the negative to that question, stating that the chances of success of the generic manufacturer in the patent proceedings or the probability of the conclusion of a less restrictive agreement constitute only some factors among many to be taken into consideration when determining how the market would operate in the absence of the contentious settlement agreement.

Originator manufacturer's abuse of dominance.

Consistently with the above mentioned analysis regarding the existence of a competitive relationship between the originator drug and its generic versions, which are not yet in the market, the CJEU confirms that such generic versions should be included in the relevant market as long as generic manufacturers are capable of entering the market swiftly and of exercising competitive pressure on the patent holder.

On the merits, the CJEU states that a strategy by a dominant company consisting in concluding a set of settlement agreements having, at least, the effect of keeping potential competitors outside the market constitutes an abuse of dominant position provided that the exclusionary effects of such a strategy go beyond those which result from each of the settlement agreements.

Conclusions

The CJEU's preliminary ruling provides some useful clarifications on the way pay-for-delay deals should be assessed under EU competition law. The analytical framework it describes as regards (i) the notion of potential competition and (ii) the inclusion in the relevant market of generic drugs not yet in the market and subject to patent dispute is particularly interesting and should have implications broader than the mere pharmaceutical sector.

However, a number of questions remain unanswered. For instance, the concept of "significant transfer of value" will necessarily be subject to interpretation and will have to be taken into account by companies contemplating entering into such types of agreements.

Similarly, assessing potential anticompetitive effects of an agreement aimed at delaying the entry of a product onto the market is not an easy task, in particular in a sector characterized by regulatory constraints and significant research and development, and will require in-depth economic analysis.

The much awaited judgments which should be issued by the CJEU in the Lundbeck and Servier cases may hopefully contribute to a further clarification of these questions.

That said, differentiating a lawful settlement agreement from an anticompetitive pay-for-delay deal remains a case by case appraisal, which highly depends on the features of the agreement itself and of the characteristics of the products and markets concerned.

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Antitrust Division ends the year with two trial victories

Over the last several weeks, the Antitrust Division of the Department of Justice (the Division) obtained two recent trial victories, providing much-needed wins after the October 2018 acquittal of three foreign-exchange traders. These convictions followed two separate years-long investigations: one into price fixing in the tuna industry and the other involving price fixing for foreign-exchange rates.

Jury convicts former tuna executive

On 3 December, a California jury found a former CEO of a tuna company guilty of one felony count of conspiring to fix prices of canned tuna in violation of the Sherman Act. The former CEO now faces up to 10 years in prison and a fine of US$10 million. During the trial, which lasted four weeks, the Division put on witness testimony from a number of former executives from tuna companies the two executives had pled guilty to the price fixing conspiracy, and one had received immunity. The Division bolstered their witness testimony with phone records showing calls between the tuna companies, as well as email evidence suggesting a conspiracy. The former CEO took the stand in his own defense and insisted he did not instruct his employees to enter into pricing agreements.

Jury convicts former foreign exchange trader Akshay Aiyer

On 20 November former foreign exchange trader Akshay Aiyer was convicted of one count of conspiring to fix prices and rig bids and offers for certain Central and Eastern European, Middle Eastern, and African (CEEMEA) currencies, in violation of the Sherman Act. During the three-week-long trial, the Division put on two cooperating witnesses who had pleaded guilty to conspiracy charges. Prosecutors also used transcripts of chat room conversations, arguing that they showed Aiyer and his alleged co-conspirators discussed their plan to cheat customers and laughed about it. Finally, the government put on witnesses from two asset management companies that had requested currency swaps to show the real-world harm of Aiyer's conduct. Aiyer's attorney argued that the chat room transcripts were merely evidence of juvenile behavior on the part of the traders and not evidence of criminal activity. Aiyer did not testify in his own defense. The New York jury, however, convicted Aiyer after less than four hours of deliberation.

Both the tuna executive's and Aiyer's convictions were much-needed wins for the Division after previous juries acquitted three former foreign exchange traders who were charged with fixing prices and rigging bids in the U.S. dollar/Euro foreign exchange market in October 2018. In the 2018 trial, the government only put on one witness - an immunized cooperating witness. The Division otherwise largely relied on chat transcripts taken from the defendants' chat room, called "the cartel," to corroborate the prosecution's lone witness. The jurors found the evidence insufficient and acquitted all three defendants.

The division learned from the 2018 trial, and in both the forex and tuna case presented multiple cooperating witnesses and relied on a broader array of documentary evidence. As a result of the more robust evidence offered at these trials, juries convicted each defendant in less than four hours. These convictions are a much-needed boost to the Division's litigation threat in future cases and a big win for prosecutors.

Companies should anticipate that the Division will be willing and able to try cases for which it can marshal sufficient evidence. Given the threat of litigation in these cases, a robust compliance program designed to prevent and detect cartel conduct is even more important to reduce the risk of an antitrust investigation and any resulting litigation or penalties. For assistance in developing an effective compliance program, please consult experienced outside counsel.

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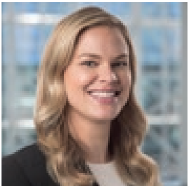

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DOJ resolves antitrust investigations into trade association standards-setting activity

On 12 December 2019, the Department of Justice Antitrust Division (DOJ) announced that it has entered into a proposed consent decree with the National Association for College Admission Counseling (NACAC) settling charges that the NACAC's Code of Ethics and Professional Practices (NACAC Code of Conduct) violated the antitrust laws. The NACAC settlement is a reminder that a code of ethics can violate the antitrust laws if it restricts legitimate competition. The consent decree comes just a few weeks after DOJ concluded another investigation related to antitrust concerns over the standard-setting activities of the GSM Association (GSMA), a trade association for mobile network operators. These two cases are the latest examples of how the U.S. antitrust regulators apply antitrust law to a trade or industry organization's standard-setting rules, codes of conduct, and ethical guidelines if they may have anti-competitive effects in a particular industry.

NACAC settlement.

DOJ's settlement with the NACAC concludes the agency's nearly two-year investigation into whether certain provisions of the NACAC Code of Conduct violated federal antitrust laws. The provisions at issue forbade NACAC members from engaging in the following activities:(1) offering incentives to students who applied for early admission; (2) recruiting students who had already committed to attend another institution; and (3) soliciting transfer applications using a previous year's applicant pool unless a transfer inquiry was initiated by the students themselves. In September 2019, in anticipation of a possible DOJ lawsuit, the NACAC removed these provisions from its Code of Conduct to address the DOJ's concerns regarding restraints of trade in college recruitment. The consent decree formalizes the removal of these provisions from the NACAC Code of Conduct. Announcing the consent decree, Assistant Attorney General Makan Delrahim stated that while "trade associations and standards-setting organizations can and often do promote rules and standards that benefit the market as a whole, they cannot do so at the cost of competition."[1].

GSMA standard-setting related to eSIM technology

The NACAC consent decree follows DOJ's recent announcement of the conclusion of a nearly two-year investigation into the standard-setting activities of the GSMA with respect to eSIM technology. The investigation looked into whether a subset of GSMA members used their influence in the industry to limit or hinder the adoption of eSIM technology, which allows a mobile device user to use multiple mobile networks without having to physically switch a SIM card in their device. In response to the investigation, the GSMA has drafted new standard-setting procedures that the DOJ believes will "have a greater likelihood of creating procompetitive benefits from consumers of mobile devices."[2] DOJ characterized these new standard-setting procedures as being designed to "incorporate more input from non-operator members of the mobile communications industry... [and] curb the ability of mobile network operators to use the GSMA standard as a way to avoid new forms of disruptive competition that the [eSIM] technology may unleash."[3] On 27 November 2019, DOJ issued a business review letter to the GSMA criticizing past standard-setting procedures while indicating that the DOJ does not intend to take action against the group or its members based on the revised standard-setting protocol.

1 Press Release, DOJ, "Justice Department Files Antitrust Case and Simultaneous Settlement Requiring Elimination of Anticompetitive College Recruiting Restraints" (December 12, 2019), available at https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-elimination.

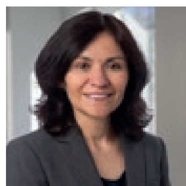
2 Press Release, DOJ, "Justice Department Issues Business Review Letter to the GSMA Related to Innovative eSIMs Standard for Mobile Devices" (December 12, 2019), available at https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-gsma-related-innovative-esims-standard.

3 Id

Key takeaways

The recent conclusion of DOJ's investigations into the NACAC Code of Conduct and the eSIM standard-setting process resulted in both organizations agreeing to revise their policies in response to DOJ concerns. Other trade associations and standards-setting organizations should note that the rules, guidelines, and procedures that they issue are likely to be analyzed by government regulators for potential anticompetitive effects, and should be drafted in consideration of compliance with the federal antitrust laws. Experienced outside counsel can work with organizations to draft these rules and guidelines to avoid triggering antitrust scrutiny from federal regulators.

Contacts



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