KEY ANTITRUST ENFORCEMENT TRENDS
2018 ANTITRUST ANNUAL REPORT
THE TEAM’S CLIENT SERVICE IS WIDELY PRAISED, WITH ONE SOURCE NOTING: “THE PARTNERS WHO WE WORK WITH ARE VERY AVAILABLE. THEY ARE VERY SERVICE-ORIENTED, RESPONSIVE AND INTERESTED IN OUR WORK.”

Chambers, 2017
# FOREWORD

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FOREWORD
Welcome to this sixth edition of Shearman & Sterling’s Antitrust Annual Report.

The 2018 edition reflects on two important trends which are contributing to a less predictable and arguably more interventionist international enforcement landscape—a global resurgence (or strengthening) of controls on foreign direct investment and the focus on ‘fairness’ we see developing in the EU.

We also discuss other noteworthy developments affecting various industries and geographies. These include enforcement under the Trump administration; Brexit and trade; the enforcement of vertical monopoly agreements in China; abuse of dominance concerns around online platforms in the EU; the long-awaited Intel ruling; reverse payment patent settlements in the pharmaceutical industry; questions of discovery and international comity in antitrust proceedings; the EC investigation of U.K. tax rules; the enforcement of gun-jumping; the DOJ’s interpretation of consent decrees; and the implications of the DOJ’s challenging Parker-Hannifin Corp.’s consummated acquisition of Clarcor Inc. Also discussed are the risks with broad theories of harm in cartel investigations involving artificial intelligence and algorithms.

2017 was a transformative year for our practice. We established an Italian practice with Paolisa Nebbia joining from the European Commission and before that the Italian Competition Authority. Elvira Alìende Rodríguez was promoted to partner in Brussels and we welcomed David Higbee, Bruce Hoffman, Djordje Petkoski, Ryan Shores, Todd Stenerson and a team of associates to our D.C. office. The move combined tremendous government and industry experience with our existing international strength in merger control, antitrust litigation and investigations. We would like to thank the entire team—lawyers and staff—for their contribution to our group’s success.

For our team, pro bono provides an opportunity to give something back and is very dear to everyone involved. We are proud of what we collectively achieve and even more so when one of us is recognized for our commitment to pro bono. Jessica Delbaum, partner in our New York office, received an award from Legal Aid in November 2017 for her dedication and contributions to the Access-to-Benefits Hotline Project, which helps underprivileged New Yorkers obtain government benefits.

This past summer, Bruce Hoffman, Global Antitrust Practice Group Leader, joined the Federal Trade Commission as Acting Director of the Bureau of Competition. We are incredibly proud of Bruce and wish him the very best in his new role.

Of course, clients are at the heart of what we do, and we wish you every success in 2018 as you continue to trust us to handle your most important and demanding cases.

DAVID HIGBEE
Global Antitrust Practice Group Leader

MATTHEW READINGS
Global Antitrust Practice Group Leader
The role of fairness in EU competition policy and enforcement has been the subject of renewed debate. A perception has emerged among commentators that the European Commission’s (EC) enforcement priorities under the current Competition Commissioner, Margrethe Vestager, seem to have become increasingly focused on ‘fairness,’ rather than the more traditional competition objectives of promoting consumer welfare and an efficient allocation of resources.

*Continued overleaf*
Is this perception well-founded? And does it represent a new policy trend towards ‘social justice’ objectives or simply a continuation of a policy driver that has underpinned EU competition enforcement for some time?

In this note we look at the evidence against the backdrop of the relevant EU legal framework.

STATE AID

The evidence for ‘fairness’ being at the forefront of EC enforcement is strongest in the area of State aid. The EC launched a series of investigations into multinational tax arrangements in 2013 to determine whether tax rulings granted undue benefits to certain companies.

The EC has already made a number of high-profile decisions requiring Member States to recover aid found to be illegal, including in relation to tax advantages granted by Luxembourg and the Netherlands to Fiat and Starbucks, respectively; Belgium’s excess profits tax scheme, which benefitted some 35 multinationals; and Apple’s tax arrangements with Ireland.

This trend has continued in 2017 with the EC reaching a decision regarding Amazon’s tax arrangements with Luxembourg and ordering €250 million to be recovered; referring Ireland to the Court of Justice of the European Union for failing to recover €13 billion in taxes from Apple, as required by the EC’s 2016 decision; opening two further Luxembourg cases (involving McDonald’s and Engie); and launching an investigation into the United Kingdom’s tax scheme for multinationals.

Fundamentally, these cases are aimed at ensuring that taxpayers’ money is not misused and removing the distortive effects caused by illegal State aid. But they must also be viewed against the backdrop of the EC’s broader objective of achieving fair taxation in the EU, which includes legislative initiatives to combat tax avoidance. Given this, it’s not surprising that both Commissioner Vestager and the President of the European Commission, Jean-Claude Juncker, have described the recent tax cases in terms of fairness and social justice (“All companies must pay their fair share of tax;” “This is the social side of competition law”).

ANTI-COMPETITIVE AGREEMENTS AND CONDUCT

In a 2016 speech, Vestager noted, “Cartels are another way for companies to protect their profits at the expense of consumers. So companies that form a cartel mustn’t get away with just a slap on the wrist.”

Cartels have remained an enforcement priority in 2017 with a number of significant decisions taken, including the re-adoption of the EC’s airfreight decision...
and a fine of €776 million imposed on air cargo carriers for participation in a price-fixing cartel; and a record fine of €2.9 billion imposed on six truck manufacturers (including an individual fine of €880 million fine for Scania) for colluding on truck pricing and on passing on the costs of new technologies to meet stricter emission rules.

There have also been notable developments in enforcement against anti-competitive conduct, where EU law prohibits a dominant firm from imposing unfair prices or unfair trading conditions.

The EC has launched a formal investigation into concerns that Aspen Pharma has engaged in excessive pricing for five life-saving cancer medicines—the first EC investigation into excessive pricing in this sector.

In terms of non-price based conduct, Google received a record fine of €2.42 billion for abusing its dominant position as a search engine by giving illegal advantage to its own comparison shopping service. Vestager noted that Google’s conduct “denied European consumers a genuine choice of services and the full benefits of innovation.”

There are ongoing investigations into other aspects of Google’s conduct which also look at the extent to which consumers are being denied the full range of choice and innovation. These include the Android operating system case, where the EC is concerned that Google has stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy on mobile devices to protect and expand its dominant position in general internet search; and the AdSense case, where the EC is concerned that Google has reduced choice by preventing third-party websites from sourcing search ads from Google’s competitors.

**COMPANIES THAT FORM A CARTEL MUSTN’T GET AWAY WITH JUST A SLAP ON THE WRIST**

**MERGERS**

A concern that consumers might be denied the benefits of innovation was also a key driver in the EC’s decision to clear the merger between Dow Chemical and DuPont. The clearance was conditioned on the companies’ agreement to divest assets, including significant parts of DuPont’s pesticides business and almost all of its R&D operations. The latter component of the remedy was designed to solve EC concerns that the merger would reduce
innovation competition, with the result that consumers (farmers) would miss out on the benefits of new pesticides that will be less toxic and more efficient. The decision has attracted attention for its analysis of competition in ‘innovation spaces’ rather than the more traditional approach of looking at specific pipeline products. Vestager noted, “This is literally a question about our daily bread and the ability for farmers to use different seeds, different pesticides in order to secure their crops.”

As the Director-General for Competition, Johannes Laitenberger, recently noted, issues of procedural fairness have also been under scrutiny in 2017, with the EC imposing a fine of €100 million on Facebook for providing misleading information during the review of its WhatsApp merger. The EC also appealed the General Court’s judgment annulling its prohibition decision in UPS/TNT on the grounds that the EC had infringed the parties’ rights of defense by failing to provide the final version of its econometric model chosen by the EC to assess the competitive effects of the proposed merger.

THE EU LEGAL FRAMEWORK

Based on the above snapshot, it’s certainly possible to consider the wide range of enforcement action taken recently and perceive there to be a common thread of ‘fairness’
But it’s important to bear in mind that fairness and social justice concepts have been enshrined within EU law and principles for some time. In particular:

• The preamble to the 2009 Treaty of Lisbon, or the Treaty on the Functioning of the European Union (TFEU), calls for concerted action to guarantee “fair competition.”

• As noted above, Article 102 TFEU which prevents abuse of a dominant position explicitly includes “unfair trading conditions” and “unfair prices” within the prohibition.

• Companies accused of anti-competitive agreements or practices prohibited by Article 101(1) TFEU can escape sanction if they can demonstrate that efficiencies are generated and consumers will be allowed “a fair share” of the resulting benefits.

• The EU State aid rules prevent Member States from granting companies a selective advantage, so that the same rules apply to everyone—which is self-evidently ‘fair’ within the ordinary meaning of that word.

• More fundamentally, following the entry into force of the TFEU, the EU has a social market economy goal among its constitutional objectives. It follows that EU competition law is supposed to implement the social market economy concept. In other words the EU isn’t a system of ‘laissez-faire capitalism.’ Rather, it involves market capitalism combined with social objectives, with competition driving wealth gains which are then to be fairly distributed.

Against this backdrop, it’s to be expected that the EC should use ‘fairness’ in describing the aims and outcomes of its work; in the EC’s view, enforcement makes markets fairer which benefits society as a whole.

Before concluding that this necessarily means that there is a fundamental difference of approach between the EU and, say, the U.S. antitrust agencies, it’s worth remembering that a recent speech by Vestager’s counterpart at the U.S. Department of Justice, Renata Hesse, referred at the outset to “the ultimate goal of antitrust, economic fairness” and ended with the following: “Our efforts protect competition, and that helps keep the economy fair.”

“OUR EFFORTS PROTECT COMPETITION, AND THAT HELPS KEEP THE ECONOMY FAIR”


7. Article 3(3) of the Treaty on European Union (TEU) sets out a target of “a highly competitive social market economy aiming at full employment and social progress.”

FOREWORD

2017 witnessed a wave of foreign investment control reform in Europe, both at Member State and European Union level. Across the Atlantic, the Committee on Foreign Investment in the United States (CFIUS) has recommended blocking one foreign transaction, which may portend increasing trade protectionism in the United States as part of the Trump administration’s ‘America First’ policy.

Continued overleaf

FOREIGN INVESTMENT CONTROL:

TRADE PROTECTIONISM OR REASONABLE CONTROL OVER A NATION’S INDUSTRIES?
FOREWORD

In China, where foreign investments used to be subject to a case-by-case evaluation, the screening process for acquisitions of local businesses by foreign investors is being simplified and becoming more industry-focused. This article provides a summary of the recent foreign investment control developments and analyzes the trends that could affect transactions in 2018.

EUROPEAN UNION

On September 13, 2017 Jean-Claude Juncker, president of the European Commission (EC), announced the EC’s intention to introduce a foreign investment screening regime. This proposal was supported by Germany, France and Italy but faced opposition from the Netherlands, Portugal and Spain. Currently, there is no harmonized foreign investment control regime at EU level, and just under half of the Member States have some sort of foreign investment control review mechanisms in place. If a merger meets the turnover thresholds of the EU Merger Regulation, Member States have some sort of foreign investment control review mechanisms in place. If a merger meets the turnover thresholds of the EU Merger Regulation, Member States’ ability to exercise foreign investment control is more limited. They can only take ‘appropriate measures to protect legitimate interests’ in public security, media plurality and financial prudential rules.

The new EU-wide foreign investment proposals would apply to transactions that cause ‘security and public order’ concerns, which would include investments in: (i) critical infrastructure; (ii) critical technologies; (iii) the supply of critical inputs; and (iv) companies with access to sensitive information or the ability to control sensitive information. With this legislative proposal, the EC attempts to achieve the objectives set out below.

First, Member States that already have a foreign investment control regime will be required to notify the EC of their review mechanisms and submit annual reports providing: (i) an overview of the application of the regime; (ii) information about the transactions reviewed or under review; (iii) whether the Member State ultimately blocked or approved the transactions, and if the approvals were subject to conditions; and (iv) the sectors, origin and value of the foreign investments screened and undergoing screening.

Second, the proposal introduces a cooperation mechanism whereby Member States reviewing a transaction must share information about the transaction with the EC and other Member States and allow them to provide their views on the transaction. If implemented as currently drafted, this particular section could have a significant effect on transaction timetables. After the Member States receive the information regarding the transaction under review, there is a 25-working-day period for Member States to submit their observations. The EC will have an additional period of 25 working days to decide whether to issue an opinion.

Third, foreign investments that could have an impact on projects or programs of EU interest will be subject to a security review by the Commission, which may...
issue an opinion to the relevant Member State. If the EC issues an opinion, the Member State is required to ‘take utmost account of the EC’s opinion and provide an explanation to the EC’ if it decides not to follow the recommendations in the opinion.

The lack of ambition of these proposals is telling. The EC has not proposed that it be given the executive authority to review foreign investment—to try to re-create the ‘one stop shop’ that exists for merger control. The EC’s role is limited to coordinating the activity of Member States and issuing an opinion if there is a direct impact on programs or projects of EU interest.

Even though these proposals have faced criticism from several Member States, it remains to be seen whether they will be implemented in 2018.

Although U.K. investors will be characterized as foreign investors once the U.K. formally leaves the EU, it is very unlikely that the U.K. or indeed other Western investors are the target of this initiative.

GERMANY

Germany was the first European country to introduce reforms to its foreign investment control regime in 2017. The reform was a response to Midea’s acquisition of German industrial robotics manufacturer Kuka for €4.5 billion and Fujian Grand Chip Investment’s proposed acquisition of German chip equipment marker Aixtron. These transactions were viewed as a sell-off of strategic German technology to companies that advance China’s industrial policy objectives.

The German government has powers to review the acquisition of 25% or more of the voting shares of a German company by a foreign investor if Germany considers that the acquisition poses a threat to public order or national security. The revised regime introduced: (i) a mandatory notification for acquisitions of targets active in the military sector and sensitive civil sectors; (ii) an extension of the review period to four months; and (iii) a non-exhaustive list of business areas in the civil sector which will be considered relevant for national security. These relevant business sectors include: (i) companies operating in critical infrastructures which are relevant for the security of supply of essential goods and services to Germany, including the energy, water, nutrition, IT and telecommunications, health, finance and insurance, and transport and traffic sectors; (ii) suppliers of dedicated software to operators of critical infrastructures; (iii) companies that are obliged to implement measures to monitor telecommunications and companies which produce the monitoring devices; (iv) certain cloud computing service providers relevant to national security; and (v) key telematics infrastructure companies operating in the public health sector. Additionally, using an acquisition vehicle in the EU or Germany will no longer render the transaction outside the scope of review. Germany will consider whether the EU or German investment vehicle actually performs economic activities or has business premises, staff and equipment. No longer is it presumed that the reason for incorporating the investment vehicle in the EU was tax efficiency and not avoiding foreign investment review.

While this reform may make Germany a less attractive destination for foreign investment, it appears that the country will primarily scrutinize transactions where the acquirer is a State-owned or State-funded entity. However, in a competitive bid scenario, sellers may prefer domestic or EU investors, as the transaction would avoid foreign investment review (although most transactions require merger control anyway and the timescales involved are likely to be similar for the vast majority of buyers).

Even for deals in the military or sensitive civil sectors, the introduction of a mandatory notification for the acquisition of targets is unlikely to have a major impact. Generally, a prudent purchaser, under the previous regime, would have filed voluntarily to obtain a Certificate of Non-Objection. Although there was no standstill obligation, the parties would not usually risk closing a transaction before receiving the Certificate of Non-Objection.

CONTINUED >
ITALY

Italy expanded its Golden Power rules on October 16, 2017 to strengthen its review powers and better protect the know-how and technological expertise of Italian companies from foreign acquisitions. The Golden Power rules apply to transactions and corporate actions involving companies in the defense and national security sectors that could pose a threat to Italy’s national security and companies in the energy, technology, transportation and communication sectors that could pose a significant threat to Italy’s interests in the security and operation of networks and systems, continuity of essential supplies and preservation of technological know-how.

Italy applies a mandatory notification procedure which requires foreign investors to notify acquisitions of equity interests in Italian-listed corporations active in the defense or national security sectors whenever the thresholds of 2, 3, 5, 10, 20 and 25% of capital are met. Acquisitions by foreign investors in the energy, technology, transportation and communication industries must also be notified. Corporate actions taken by foreign owners of Italian companies that could change the company’s ownership structure, corporate purpose or liquidate the operations of the company’s business must also be notified. Failure to make these notifications could lead to a fine of up to twice the monetary value of the transaction, which cannot be less than 1% of the turnover of the companies involved.

Italy places particular importance on acquisitions by foreign investors that could change the corporate governance and policies of Italian companies. These include the relocation of the company’s headquarters or manufacturing plants outside of Italy and transferring know-how outside of Italy for the benefit of foreign investors.

Although Italy retains the power to block transactions, its enforcement practice has focused on behavioral restrictions. Italy has wide powers to impose: (i) conditions on the composition and structure of the board of the target company; (ii) ongoing monitoring requirements to ensure compliance with imposed conditions; (iii) safety measures requiring the implementation of safety plans or appointment of a chief safety officer; and (iv) measures of an organizational and structural nature aimed at ensuring the confidentiality of information and technological know-how of the target.

Unlike Germany, Italy imposes a statutory standstill period of 15 days, during which the Italian government reviews the transaction. This review period can be extended for a maximum of 10 days if the Italian government requires further information from the parties. The notification must be submitted within 10 days of the acquisition or enactment of a corporate resolution. This short review period is unlikely to adversely affect transaction timetables. The more burdensome issue is the ongoing monitoring of corporate resolutions to determine whether a notification should be submitted. In light of Italy’s reluctance to block transactions, the foreign investors’ chief concern would be the nature of the conditions that the Italian government may impose on the governance or operating structure of the acquired entity.
THE SECOND MODEL WOULD INTRODUCE A MANDATORY FILING REGIME FOR TRANSACTIONS IN ‘ESSENTIAL FUNCTIONS’ OF THE ECONOMY THAT COULD POSE LEGITIMATE NATIONAL SECURITY CONCERNS

UNITED KINGDOM

The U.K. proposed the introduction of a foreign investment control regime in the autumn of 2017. Although the U.K. does not currently have a foreign investment control regime, the government is able to intervene in any transaction that adversely affects national security interests, the plurality, standards and quality of the media and the stability of the U.K. financial system.

On October 17, 2017, the U.K. government published a green paper outlining two models for a foreign investment control regime: (i) in the short term, amending the turnover thresholds for transactions involving companies in the military and dual-use sectors and the advanced technology sector; and (ii) in the long term, enacting a self-standing regime to evaluate transactions affecting critical businesses that are essential to Britain and British society.

The short-term proposal would amend the turnover thresholds from the current £70 million to £1 million and eliminate the requirement for the merger to increase the share of supply to or over 25%. Should a merger in these sectors pose a national security concern, the Secretary of State would have the power to block the transaction. This proposal would be enacted through secondary legislation, thereby sidestepping a parliamentary debate on the legislation.

The U.K. has proposed two different models for the long-term foreign investment regime. Under the ‘expanded call-in powers’ model, the U.K. would retain the voluntary merger filing regime but expand the range of transactions where the Secretary of State could intervene to safeguard national security objectives. The Secretary of State’s intervention would be justified where it is reasonably believed that national security risks would be raised by the acquisition of significant influence or control over any U.K. business entity by an investor (either domestic or foreign). This model defines control as more than 25% of a company’s shares or votes. There would also be a ‘second limb’ test for transactions that give (directly or indirectly) significant influence or control over a company or over its assets or businesses in the U.K. The government is yet to publish how this second-limb test would be formulated.

The second model would introduce a mandatory filing regime for transactions in ‘essential functions’ of the economy that could pose legitimate national security concerns. Transactions in the civil nuclear, defense, energy, telecommunications and transport sectors would be subject to foreign investment screening. Government intervention would also be justified in circumstances where there are no other reasonable means to adequately mitigate the risks posed by foreign investment and where existing licensing or regulatory regimes are insufficient to provide the government with the information and powers required to protect national security. The government also envisages the introduction of sanctions for failure to notify, which could include financial penalties, criminal offenses and the disqualification of directors.

The consultation to the short-term proposal closed on November 14, 2017 and the deadline for submitting observations on the long-term proposals was January 9, 2018.

CHINA

While the EU and U.S. are expanding the scope of the transactions that would fall under their foreign investment screening regimes, China is moving in the opposite direction. Since the gradual opening of its market from the late 1970s until 2014, foreign investments in China were subject to approval after a case-by-case assessment, regardless of the size and origin of the parties, the investment value or the industry involved. However, a gradual reform of the foreign investment procedure started in 2014, which saw the departure from the case-by-case assessment model and culminated in the adoption of the Pre-establishment National Treatment plus negative list system. In July 2017, China introduced a simplified file-for-record procedure which applies to acquisitions of Chinese businesses by foreign investors, provided the transaction does not relate to an industry appearing in the negative list. Transactions that fall under the negative list would have to be approved under the burdensome case-by-case analysis.
The negative list, which forms part of the Catalogue for Guidance of Foreign Investment Industries (Catalogue), is an essential element of Chinese industrial policy and indicates the level of sensitivity that China has towards foreign investment in a particular industry or sector. The Catalogue also contains a list of industries where China actively encourages foreign investment and offers several incentives to attract foreign capital.

The negative list in the 2017 Catalogue has a limited scope (63 industries in total, but representing a small proportion of the Chinese economy). It appears that most foreign investments into China will be exempt from foreign investment approval. While this may be true, transactions involving foreign investors may be subject to national security review (NSR) and/or merger control reviews. These, in addition to the foreign investment review mentioned above, are separate procedures with different thresholds. Receiving approval under one review system is not a pre-condition for approval under the others, and the outcome of the reviews may not be consistent. It is also notable that merger control in China is operated by MOFCOM rather than an independent competition agency and on the basis of a public interest test—which can permit non-competition concepts to enter the merger control analysis.

Acquisitions of domestic businesses active in the ‘national economic security sectors’ by foreign investors will only require NSR approval if the foreign investor acquires control over the target. For these purposes, control is defined as the acquisition of 50% or more of the shares of the target or the ability to exercise decisive influence over the target. By contrast, any acquisition (no matter how low) of a business operating in the ‘national defense security industry’ by a foreign investor would require NSR approval.

Transactions that meet the relevant turnover thresholds and result in a change of control would require merger control approval. The merger control does not target foreign investment per se, and theoretically the review should not be impacted by factors other than competition. However, in a number of mergers involving foreign entities, the Chinese merger control authority imposed remedies even though the parties’ market power in the relevant market would not normally be sufficient to trigger antitrust intervention. Remedies in these cases make more sense when thought of as safeguards for Chinese industrial interests.

The merger control regime is particularly relevant in terms of ‘foreign to foreign’ deals in raw materials. Neither NSR nor foreign investment review apply to offshore transactions, and given China’s perception of reliance on imported raw materials, the merger control system becomes the only way to pursue Chinese industrial policy concerns with respect to these transactions.

Unlike the foreign investment review mechanism, the NSR and merger control review processes do not contain a list of sensitive industries. Past decisions, regulations and guidance notes from government agencies provide helpful references for evaluating the likelihood of an industry being considered ‘sensitive.’ However, the industries that may be considered sensitive under the review mechanisms do not necessarily overlap. For example, potash appears in the ‘encouraged list’ of the Catalogue, meaning that it is not considered sensitive under the foreign investment review procedure. However, the recent decisions of Uralkali/Silvinit and Agrium/Potash Corp of Saskatchewan confirm that potash is considered a sensitive industry under the merger control review.

With the introduction of the ‘PENT plus negative list’ model, foreign investors should expect a swifter and more efficient regulatory approval process for most investments in China. However, transactions in the industries highlighted in the ‘negative list’ will face significantly higher scrutiny. While the recent reforms are a welcome development, foreign investors still face the challenges of two additional regulatory review processes and related filings.

CFIUS

Under longstanding U.S. law, Presidents may block a transaction by a foreign person or entity that could result in foreign control of a U.S. business if they determine that the transaction will impair national security. The President has delegated this national security review authority to Committee on Foreign Investment in the United States (CFIUS), a nine-agency committee chaired by the Department of the Treasury.

As part of its grant of authority, CFIUS may block transactions, order divestitures or impose other conditions on a transaction within its jurisdiction at any time, including after the transaction is consummated, to preserve national security. Except in limited circumstances, CFIUS’s decision to take any such action is not reviewable by the courts.
To provide certainty to foreign investors that their transactions will not be blocked prior to closing or unraveled after consummation, CFIUS has implemented a voluntary notification process. Under CFIUS’s regulations, if a foreign investor notifies CFIUS of a transaction and CFIUS clears it of national security concerns, CFIUS and the President may not order divestitures or other conditions at a later date.

CFIUS’s national security review can take between 30 and 90 days (depending on the level of review) from the time CFIUS ‘accepts’ the notification. Parties that plan an notifying CFIUS of a transaction may contact CFIUS before filing to identify potential issues at an early stage and expedite the review process.

Data published by CFIUS shows an increasing number of notifications in recent years and that CFIUS reviews are taking longer, mostly driven by increased investment by Chinese companies. To illustrate, from 2005 to 2007 (the first three years for which data is available), CFIUS received 313 notifications; four (1.2%) of those transactions involved Chinese investors, CFIUS performed a second-level review on 14 (4.4%) transactions and 36 (11.5%) notifications were withdrawn during the first- or second-level review. The President did not block any transactions from 2005 to 2007. By contrast, from 2013 to 2015 (the most recent three years for which data is available), CFIUS received 387 notifications; 74 (19.1%) of those transactions involved Chinese investors, CFIUS performed a second-level review on 165 (42.6%) transactions and 33 (8.5%) notifications were withdrawn during the first- or second-level review. The President also did not block any transactions from 2013 to 2015.

However, due to a recent spike in foreign investment, particularly by Chinese investors in the technology sector, two of the four presidential blockages have occurred since December 2016, both involving proposed acquisitions of U.S. semiconductor businesses by Chinese investors. Given President Trump’s “America First” platform, CFIUS review and presidential action are increasingly important risk factors for foreign investors to consider when investing in U.S. companies.


<table>
<thead>
<tr>
<th>YEARS</th>
<th>NO. TRANSACTIONS NOTIFIED</th>
<th>NO. TRANSACTIONS INVOLVING CHINESE INVESTORS</th>
<th>NO. TRANSACTIONS WITH SECOND-LEVEL REVIEW</th>
<th>NO. TRANSACTIONS WITH NOTIFICATION WITHDRAWN</th>
<th>NO. TRANSACTIONS BLOCKED</th>
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<td>397</td>
<td>74</td>
<td>165</td>
<td>53</td>
<td>0</td>
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Many jurisdictions across the world have mandatory notification regimes. When the relevant filing thresholds are met, the merger review process has a suspensive effect on the transaction, meaning that the parties must continue to operate as competitors and cannot integrate until they receive merger approval.

‘Gun-jumping’ refers to unlawful conduct of the merging parties before such approval is granted, including early implementation of the merger, the coordination of competitive conduct or the unrestricted exchange of competitively sensitive information.

Continued overleaf
Gun-Jumping and Procedural Compliance

The EU and U.S. competition authorities have been and remain active in enforcing gun-jumping cases, while in recent years other competition authorities across the world, including in China, have also become increasingly active. This is a trend we expect to continue.

At the time of writing, the European Commission (EC) is investigating two potential gun-jumping cases—Altice/PT Portugal and Canon/Toshiba Medical Systems (TMS).

These cases are significant because, while the EC has made clear that in each case its approval in respect of the merger will not be affected, they demonstrate that not only is gun-jumping a live risk, but the EC is prepared to pursue potential procedural infringements even if the risk of serious harm is low.

Canon/TMS involves allegations that Canon implemented the merger before both notifying and obtaining approval from the EC. This case involved a two-step acquisition procedure known as ‘warehousing.’ On signing, Canon acquired a single non-voting share in TMS, for which it paid effectively the full value of TMS. At the same time, an interim buyer acquired voting shares in TMS for a nominal amount. Canon also took options over these shares. Canon intended to have control of TMS only when it exercised the options following notification and merger approval. The EC cleared the merger in September 2016 but has subsequently opened an investigation into whether these arrangements let Canon effectively acquire TMS before it notified the deal.

The Canon case is particularly significant as the EC has taken issue with the very design of the transaction. Warehousing structures are not uncommon. They can, for example, be used in auctions to enable potential ‘strategic’ purchasers, whose business may overlap with a target’s, to compete on a level playing field with potential private equity purchasers, which are less likely to have competition issues. In the Canon case, the structure was designed to enable the purchase price to change hands as quickly as possible on signing, as Toshiba was in urgent need of cash to balance its books following an accounting scandal. The Canon case highlights the need for businesses to be aware of the risks certain transaction structures may bring, particularly as the reason for breach is irrelevant, whether deliberate, negligent or innocent.

However, it is not just the EC that has taken issue with the arrangements in Canon/TMS. The opening of its investigation followed a public warning by the Japanese competition authority, the Japan Fair Trade Commission (JFTC), in 2016 that the arrangements may be in violation of antitrust law. The JFTC did not impose a fine on Canon, but the public announcement serves as a warning to others contemplating similar structures. The Chinese competition authority, the Ministry of Commerce (MOFCOM), went a step further and, in January 2017, fined Canon RMB300,000 (approx. US$45,166) for failure to notify the transaction at the first step.
In this regard, the Canon case highlights a significant discrepancy in the severity of risk posed by breaching gun-jumping rules across the different regimes, particularly between China and other merger control jurisdictions, such as the EU and the United States.

In the EU, the financial consequences of running afoul of the rules can be severe. The EC can impose a fine of up to 10% of worldwide turnover, should it decide that Canon has broken the rules. The EC has previously fined companies up to €20 million for gun-jumping. Similarly, in the United States, the Department of Justice (DOJ) can impose fines of up to US$41,484 per day, per company that is out of compliance, for gun-jumping offenses. The DOJ has obtained civil penalties as high as $5.67 million for gun-jumping violations, when it reached a settlement in 2003 with Gemstar-TV Guide, reflecting the then-maximum penalties of $11,000 per day that each company was out of compliance.

By contrast, in China, the maximum financial penalty for gun-jumping is a fine of RMB500,000 (approx. US$75,277). It is certainly true that in recent years China has increased its focus on enforcing gun-jumping rules. As of the end of 2017, the Ministry of Commerce (MOFCOM) of the Government of China has publicly announced 17 gun-jumping cases. However, the average amount of the fine imposed per penalized company is RMB190,000 (approx. US$29,000). This has led to criticism that the fines are too low to act as a sufficient deterrent to prevent companies from taking calculated risk with regard to jumping the gun.

For large-scale transactions, the financial cost for each day of delaying the closing can easily exceed the average fine for gun-jumping. However, gun-jumping may lead to additional and substantive delay of clearance. MOFCOM can request the parties to suspend the implementation during the gun-jumping investigation, and did so in seven out of the 17 cases. On average, the investigation period takes approximately 230 calendar days. So even if the fine is insignificant, gun-jumping may lead to severe loss considering the possible additional delay of the transaction.

For companies with multi-jurisdictional operations engaging in complex M&A transactions, evaluating the risks posed by gun-jumping rules across jurisdictions can be particularly challenging; not only do the rules frequently lack clarity, but the assessment by the regulators takes place on a case-by-case basis and there are often differences in approach between regimes. However, the competition authorities have recently shown that they are likely to enforce the rules rigorously as a deterrent to others. Given the increased enforcement activity in this area from competition authorities across the world, businesses must be aware of the risks and take measures to mitigate these based on the individual circumstances of their case.
On September 26, the Department of Justice (DOJ) filed a complaint in Delaware federal court challenging Parker-Hannifin Corp.’s US$4.3 billion consummated acquisition of Clarcor Inc. The challenge, which comes more than eight months after the applicable waiting period expired under the Hart-Scott-Rodino (HSR) Act, serves as a reminder that receiving HSR clearance does not immunize a transaction, even after closing.

Continued overleaf

HSR CLEARANCE DOES NOT PROVIDE IMMUNITY FROM INVESTIGATION OR CHALLENGE
On December 1, 2016, the parties announced the transaction and, on December 15, complied with the HSR pre-merger notification requirements by making necessary submissions with the federal antitrust agencies. The DOJ let the statutory waiting period under the Act expire on January 17, 2017, without issuing a Request for Additional Information and Documentary Materials (commonly referred to as a second request). According to Parker, the agency did not express any concerns with the proposed transaction during that initial 30-day waiting period. On February 28, the parties completed their transaction.

The DOJ initiated an investigation in March 2017, reportedly in response to customer complaints, and ultimately filed a civil antitrust suit in federal district court seeking a divestiture and any other action necessary to restore Clarcor's competitive significance in the markets for certain qualified aviation fuel filtration products.

In its October 18 answer to the complaint, Parker criticized the DOJ for taking so long to bring the challenge.

According to the DOJ’s complaint, Parker and Clarcor were the only two domestic suppliers of qualified aviation fuel filtration systems and fuel filtration elements. The transaction allegedly eliminated their head-to-head competition and effectively created a monopoly in these markets in the United States. The DOJ concluded that the

HSR Clearance Does Not Provide Immunity From Investigation or Challenge

BACKGROUND

THE AGENCY DID NOT EXPRESS ANY CONCERNS WITH THE PROPOSED TRANSACTION DURING THAT INITIAL 30-DAY WAITING PERIOD

COMPLAINT AND CHALLENGE
merger threatened to result in “higher prices, reduced innovation, less reliable delivery times, and less favorable terms of service for the American businesses and military that depend on these critical products.”

To restore competition and restrain the anti-competitive effects resulting from the transaction, the DOJ is seeking a divestiture of tangible and intangible fuel filtration assets sufficient to recreate the competition that existed in the relevant fuel filtration markets prior to Parker’s acquisition of Clarcor.

The complaint refers to internal company documents that, according to the DOJ, reveal that the merging parties knew that the transaction raised serious antitrust concerns. In a document created in the weeks before the transaction was announced, a Parker executive identified “the notable area of overlap” between the parties in “ground aviation filtration” and asked whether the company should be “forthcoming” about this “aviation antitrust potential.” In the same document, the executive said the company was preparing for a potential divestiture of Clarcor’s aviation fuel filtration business.

Notably, the markets that are being challenged represent a relatively small part of the overall deal: While the parties’ combined 2016 revenues exceeded US$13 billion, the combined annual revenues for the fuel filtration businesses under inquiry are less than US$20 million, according to a Parker press release.

THE MERGING PARTIES KNEW THAT THE TRANSACTION RAISED SERIOUS ANTITRUST CONCERNS

KEY TAKEAWAYS

The DOJ’s challenge of Parker/Clarcor highlights a number of important considerations that parties contemplating a transaction should keep in mind, including the following:

- The DOJ and the FTC can and do challenge consummated deals, no matter how small the businesses in question may be.
- The expiration of the HSR waiting period does not immunize a deal from investigations or challenges (although challenges of reportable deals post-closing are still very rare).
- There is no statute of limitations on government actions challenging mergers.
- Parties should be aware of the importance of customer satisfaction and document creation—both before and after closing—which can affect the likelihood, length and outcome of any regulatory review.
MERGER CONTROL

Merger reviews by the European Commission (EC) have traditionally focused on the impact of mergers on the price, costs and quality of products and services as a result of the merger. The EC also considers the extent to which innovation will be affected, a factor recognized in its legislative guidelines and identified last year by Commissioner Vestager as an important part of EC merger policy.

Continued overleaf

MERGERS AND INNOVATION:

A NEW THEORY OF HARM?
Mergers and Innovation: A New Theory of Harm?

The EC’s decision in Dow/DuPont has widened such analysis, and its impact on the outcome in Bayer/Monsanto and the EC’s merger control consultation is yet to be seen.

INNOVATION VS. COMPETITION: PRE-DOW/DUPONT

There are two broad opposing theories on the relationship between innovation and competition. On the one hand, less competition may be regarded as leading to more innovation, as with fewer rivals to compete with, a company may be expected to realize greater profits from its innovations. This is known as increased appropriability. On the other hand, more competition may lead to more innovation, as increased contestability and competitive pressure will encourage companies to produce better products and services. Equally, the relationship between innovation and competition may not be regarded as linear, and other factors may be considered when determining whether innovation will be affected by a transaction, including the parties’ incentives and abilities to innovate.

Innovation itself can relate to either products or processes, or be incremental or breakthrough in nature. The EU’s Horizontal Merger Guidelines recognize that innovation falls within the EC’s overall consideration on a merger’s potential to increase market power and is to be considered even in cases with a lower impact on the market. The Non-Horizontal Merger Guidelines also recognize the potential diminishment of innovation arising from a merger increasing market power.

In horizontal cases, the EC’s key concern is whether the parties’ incentives to innovate will decrease post-merger due to a lower investment in, or elimination of, pipeline products that would otherwise enter the market. In a number of previous cases, divestments of late-stage pipeline products and accompanying manufacturing equipment, test facilities, IP rights, know-how, technology and key personnel were required to maintain innovation. In other cases, parties committed to ensuring that Phase II pipeline products were not delayed or discontinued, and third parties entered into agreements committing to worldwide R&D for earlier stage pipeline products.

By contrast, innovation efficiencies were recognized in TomTom/TeleAtlas, a vertical integration of a navigation systems producer and digital maps developer. The deal was cleared unconditionally on account of its potential improvement of the quality and timing of digital maps. However, the exact magnitude of the efficiencies was left undiscussed, giving little guidance on how the Horizontal Merger Guideline requirements for proving efficiencies can be satisfied where these relate to innovation.
In June 2016, a merger between Dow Chemical and DuPont was notified to the EC. After a Phase II investigation which commenced in August 2016, the EC finally approved the merger in March 2017, subject to a comprehensive remedies package.

The EC’s finding of innovation harm related to: (i) earlier stage pipeline products in respect of which the parties’ existing R&D overlapped; and (ii) overall innovation in the crop protection industry. The EC ordered the divestment of almost the entirety of DuPont’s global R&D organization, including all related assets, personnel, patents, know-how and other IP rights, allowing the purchaser to replace DuPont with full R&D capabilities and continue to innovate for the benefit of consumers. In reaching its finding, the EC relied on evidence related to patent data in the crop protection industry, and the parties’ intention to cut back on R&D expenditure and personnel outlined in internal documents, direct competition on a number of product innovations, and position in the surrounding market, which had only five competing global R&D organizations in total.

Unlike previous cases focusing on innovation risk to existing products or pipeline products likely to reach a specific market within a reasonable amount of time, the EC adopted an approach that is both expansive in looking to general industry innovation concerns and speculative in looking to very early-stage pipeline products (as the EC itself recognized, it would take the parties up to 10 years and almost US$250-300 million to launch formulated products). The EC concluded that its assessment was not speculatively linked to the merged entity’s behavior on a long-term basis, but to the likelihood of behavior harmful to innovation arising soon after the merger. However, it acknowledged its inability to identify the specific early pipeline products or lines of research affected. The EC also placed weight on the importance of contestability in the market as an incentive to innovate, as well as concerns that the merger could de-incentivize the merged party to innovate due to fears that this would result in the cannibalization of profits of existing products. The EC did this without any form of balancing exercise against the opposing consideration that the merger may lead to increased appropriability in respect of new innovations, and thereby increase the incentive to innovate. This arguably constitutes a new theory of harm, conflicting with the traditional parameters of the EC’s innovation assessment in its Horizontal Merger Guidelines (these, by contrast, suggest that the EC will limit its innovation analysis to foreseeable or reasonably predictable changes to existing product or technology markets).
Mergers and Innovation: A New Theory of Harm?

Such a new approach should only be justified when supported by sound economic theory and a uniform set of factors for consideration, both of which are lacking in the innovation space. It remains to be seen whether the EC takes a similar view in Bayer/Monsanto; reports of intense EC scrutiny and potential divestments of Bayer’s seed and crop protection business to BASF would point to that conclusion, although equally the EC cleared the agrochemical ChemChina/Syngenta merger in April 2017 without finding any innovation harm.16

EU MERGER CONTROL CONSULTATION: A CONFLICT?

The EC’s public consultation on the procedural and jurisdictional aspects of EU merger control (October 2016 to January 2017) included suggestions to replace the current EU turnover thresholds with transaction value thresholds, catching high-impact transactions that would otherwise not meet the turnover requirements. In the responses, such thresholds were generally deemed an unnecessary expansion of the EC’s merger control jurisdiction, liable to have a chilling effect on innovation by potentially capturing technological ‘start-ups’ or other inherently innovative firms within the scope of merger review.

This highlights a potential conflict; while the EC’s recent decisional practice illustrates an attempt to protect innovation by adopting a broad
assessment of innovation harm, proposed changes to the existing merger control thresholds may de-incentivize newer companies from innovating, given the likelihood of inclusion within the EC’s merger review jurisdiction. The practical outcome of the consultation findings is yet to be seen, including whether the EC will adopt jurisdictional thresholds based on transaction value following recent corresponding changes in Germany and Austria.

CONCLUSION

Innovation is clearly high on the EC’s agenda; in Director-General Laitenberger’s view, innovation “is not necessarily good, or at least, it is not always good in every respect.” The eventual Bayer/Monsanto decision, however, will be instructive on whether the EC will sustain its expansive assessment of potential impacts on innovation by looking far into the future and at industries as a whole. Merging companies for which innovation and R&D are a key part of business strategy should still remain aware of, and prepare for, the potentially wide scope of the EC’s innovation assessment (involving detailed reviews of R&D profiles, pipeline products at early development stages, patents and IP rights), and the correspondingly broad divestments that may be required for clearance. Such companies should also be aware that possible changes to the jurisdictional thresholds may bring more mergers in innovative sectors within the fold of the EC’s newly expansive review.

17. Speech by Johannes Laitenberger, CRA Conference (December 12, 2017).
The term ‘joint venture’ describes a wide range of commercial arrangements. The structure of a commercial joint venture can range from a full merger to looser contractual arrangements on joint R&D, and everything in between. The exact structure chosen will be crucial to determining the assessment of a joint venture under European Union (EU) competition law. For a joint venture between actual or potential competitors, the type of assessment applicable can have significant negative implications for the certainty, timeliness and efficacy of the joint venture’s implementation.

Continued overleaf
On September 7, 2017, the Court of Justice of the European Union delivered an important preliminary reference ruling clarifying the application of the EU Merger Regulation (EUMR) to joint ventures.1

Historically, the European Commission (EC) interpreted the EUMR flexibly in respect of joint ventures. The Court’s ruling clarified that a joint venture is only a concentration—and therefore within the ambit of the EUMR—if it “perform[s] on a lasting basis all the functions of an autonomous economic entity.”2 This means that in addition to the financial thresholds, a joint venture must satisfy the ‘full functionality’ criteria in the EC’s guidance, essentially that a joint venture must be operationally autonomous: (i) with sufficient resources to operate independently; (ii) performing more than one function of its parents; (iii) not substantially reliant on its parents for sales or purchases; and (iv) operational on a lasting basis.

This ruling applies to all joint ventures that emerge from a transaction “regardless of whether that undertaking, now jointly controlled, existed before the transaction in question.” The practical implication is that acquisitions of joint control are only reviewable under the EUMR if the joint venture is full function and, conversely, acquisitions of joint control are not reviewable under the EUMR if the target is not a full function undertaking. Previously, some joint ventures were reviewed where they simply constituted part of a business to which revenue could be attributed.

At first glance, it may appear favorable to avoid the EU merger review process and the accompanying mandatory review period. However, the reality can be very different. Joint ventures which are not concentrations for the purposes of the EUMR are still reviewable under the traditional antitrust rules—specifically Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibiting anti-competitive agreements between undertakings.

Transactions under the EUMR benefit from a fixed statutory review timetable and are assessed against a well understood and generally accepted standard of review, concluding with a formal decision. Moreover, the EC conducts a ‘one-stop-shop’ review covering all EEA countries. Approval of the transaction is binding across all EEA Member States in terms of both merger control and Article 101, which is covered as part of the substantive merger review. This green light allows the parties to implement the joint venture with certainty.

However, outside the EUMR the EC can initiate a review under Article 101 TFEU at any time. Once the EC initiates a review, the review period is undefined and typically much more difficult to predict in terms of duration and outcome. The parties may never actually receive legal certainty in the form of a definitive answer, and the joint venture could still be reviewable in individual EU Member States as a merger since some Member States have broader jurisdictional tests for joint ventures (Germany, United Kingdom, Austria and Poland).
In China, a contractual joint venture (not involving joint control of a legal entity) is generally understood to fall under the traditional antitrust rules, though this distinction is not expressly stated in law. Beyond this, no distinction is made between full function and non-full function joint ventures involving joint control of a legal entity. This may result in a non-full function joint venture being notifiable in China but assessed under Article 101 TFEU in the EU. An example of this can already be seen from the P3 Shipping Alliance in 2014, which was reviewed as a merger in China but not in the EU. The tightening of the EU jurisdictional test makes this outcome more likely in the future.

Similarly, in the United States a joint venture may be notifiable where it relates to, or affects, U.S. commerce and meets the requisite financial thresholds. The concept of full functionality is not recognized. What is relevant is the value of the assets or securities over which control is acquired. Again, this creates the possibility of different concurrent reviews of the same transaction structure. In a scenario where different competition rules apply, precautions should be taken to ensure the joint venture does not go beyond what is acceptable coordination in the context of Article 101 TFEU, even if the same structure has received formal approval elsewhere.

Despite full functionality being irrelevant for the application of the merger control rules in key antitrust jurisdictions like the United States and China, this distinction is still worth careful thought and attention—particularly for a joint venture with potential horizontal effects in the EU. Structuring a transaction to fall under the EU merger rules is likely to carry significant benefits. Early planning of applicable antitrust rules across multiple jurisdictions is strongly encouraged.

For joint ventures involving some form of horizontal cooperation between actual or potential competitors, this distinction is significant since these joint ventures do not benefit from the block exemptions under Article 101 TFEU. Such joint ventures are typically much more difficult to defend and more likely to be subsequently investigated. A carefully designed joint venture structure can avoid this risk by instead benefiting from the EUMR review process. This is purely a commercial predicament for the parties. The full function criteria do not relate to the substance of the review; they merely act as a jurisdictional gating item to the EUMR.

In time, the EC is likely to revise its guidance in light of the Austria Asphalt decision since the application of the EUMR can now turn solely on whether the acquirer is acting solely or in joint control with others. Until then, competing joint venture in Europe should think early and carefully about how to structure their transaction.

**Comparative Analysis: China and the United States**

The concept of full functionality is largely limited to the EU; most jurisdictions do not recognize this concept. Following Austria Asphalt, this could lead to difficulties in implementing a multi-jurisdictional joint venture, since there is an increased risk the transaction may be subject to different legal frameworks and standards of review in different jurisdictions.

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MERGER CONTROL

Our enforcement agencies are tasked with the difficult job of evaluating mergers to assess their effect on the competitive landscape. While most mergers are able to pass agency review unscathed, there are a select number that could lead to anti-competitive outcomes if allowed to proceed. It is for these mergers that remedies come into play. Traditionally, if an enforcement agency found that a merger was likely to substantially lessen competition, it would impose a structural remedy. Of course, structural remedies aren’t without their own complications, but by and large, enforcement of structural remedies are fairly straightforward: either the merger is blocked/abandoned or the assets or portion of a business are sold to a third party.

Continued overleaf

THE DOJ’S EVOLVING APPROACH TO CONSENT DECREES
While structural remedies remain the primary remedy of choice, and virtually the only option in the case of horizontal mergers, under the Obama Administration and with respect to vertical mergers, the agencies increasingly embraced the use of remedies that regulate the combined firm’s conduct, also known as behavioral remedies. This trend, however, may soon come to an abrupt halt as the Department of Justice’s (DOJ) new Assistant Attorney General of the Antitrust Division, Makan Delrahim, has made it clear that his regime will look at behavioral remedies with a much more critical eye.

The DOJ was not always keen on employing behavioral remedies. Prior to 2011, the DOJ’s 2004 Antitrust Division Policy Guide to Merger Remedies (2004 Merger Remedies Guide) illustrated skepticism towards remedies that regulate conduct. The 2004 Merger Remedies Guide had stated that “[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement.” The 2011 Merger Remedies Guide, on the other hand, took a different approach. Not only did the 2011 version remove the statement illustrating preference of structural remedies, but also deleted comments that behavioral remedies were only appropriate in a narrow set of circumstances. Taking a more accepting approach, the 2011 Merger Remedies Guide state that “[i]n certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances behavioral relief may be the best choice.”

Needless to say, several of the DOJ’s challenges to vertical mergers in the following years resulted in consent decrees that focused on regulation of the combined firm’s conduct. Specifically, the consent decrees in Live Nation/Ticketmaster, Comcast/NBCU and Google ITA Software contained a number of behavioral remedies, including anti-retaliation provisions protecting customers contracting with the firms’ competitors, obligations to provide non-discriminatory access to necessary inputs, requirements to continue to develop upgrades and invest in specific products, the creation of informational firewalls and various reporting requirements, including reporting competitors’ complaints.

There are several problems that emanate from the use behavioral remedies, especially in the merger context, which Delrahim addressed in a recent keynote at the American Bar Association Antitrust Fall Forum on November 16, 2017. As Delrahim noted, the DOJ’s goal in remedying anti-competitive transactions should be “to let the competitive process play out.” However, by replacing competition with regulation, behavioral remedies often fail to achieve this goal, requiring “centralized decisions instead of a free market process.” Behavioral remedies inevitably are static, based on the view of competitive market conditions at a specific point in time (i.e., the time of the merger). However, markets are often dynamic, particularly those in rapidly evolving industries, such as those in tech-based industries. Unsurprisingly, behavioral remedies often fail to predict the ways in which the market and competition may evolve and have the effect of locking the combining firm into a behavior that may ultimately restrict
This is not to say that behavioral remedies should be banned outright. In fact, Delrahim did acknowledge in his keynote that his remarks should not be interpreted as a blanket statement that the DOJ will never accept behavioral remedies. As the 2004 Merger Remedies Guide conceded, there are certain circumstances where behavioral remedies can be beneficial in the merger context. For instance, one could conceive of a pro-competitive merger where no divestiture is feasible, yet if allowed to proceed, would result in net benefits to customers. In this situation, the implementation of behavioral remedies would allow such a merger to proceed, where the DOJ would have otherwise challenged such merger absent such remedies.

However, such instances are a small percentage of all merger activity, and it does not appear the DOJ will be as accepting as the Obama administration. Indeed, the DOJ seems to already be employing Delrahim’s philosophy, suing to block the AT&T/Time Warner merger. As AT&T has argued, any anti-competitive concerns caused by their proposed merger with Time Warner could be cured by behavioral remedies, similar to those the DOJ has employed in past cases, specifically the Comcast/NBCU merger.

So what does all this mean for the future? As Delrahim stated, the DOJ should strive to employ consent decrees that are administrable and do not take “pricing decisions away from the markets.” As such, the DOJ will continue to review settlement offers but will be skeptical of any remedy—be it behavioral or divestiture—that does not completely remedy the competitive harm. If the AT&T/Time Warner challenge is any indication, in the context of behavioral remedies, it seems that the DOJ will be employing a very critical eye indeed.


its ability to adapt to the changing market conditions. Thus, in regulating how a firm interacts with its customers and competitors, it is very difficult for regulators to fashion rules that ban anti-competitive conduct without precluding the pro-competitive. Furthermore, given the ever-changing nature of markets, it is difficult to determine when behavioral remedies should expire. Short-term remedies simply serve as a ‘band-aid’ rather than a fix, only delaying the firm’s exercise of market power. However, as Delrahim notes, indefinite commitments would transform the DOJ into “full-time regulators instead of law enforcers.”

This leads to another issue with behavioral remedies: the challenge of enforceability. Although he did not touch upon specifics, Delrahim mentioned in his keynote that the DOJ is investigating behavioral decree violations over recent years and that it has proven difficult to collect information or satisfy the standards of proving contempt and seeking relief for the violations. Regulators do not have a continuous view into the day-to-day operations of a business, which makes it difficult to monitor and enforce “granular commitments like non-discrimination and information firewalls.” Requiring the DOJ to enforce such remedies would involve constant oversight into the affairs of a business, which, even if it was feasible, would detract the agency’s attention from other investigations that might warrant intervention to prevent anti-competitive conduct.
ALBEMARLE CORPORATION
Advised on the sale of its Polyolefin catalyst and catalyst components business to W. R. Grace & Co.

Advised on sale of Chemetall to BASF.

AMERICAN AXLE & MANUFACTURING HOLDINGS
Advised on its acquisition of Metaldyne Performance Group, a leading provider of highly engineered lightweight components for use in powertrain and suspension applications, for approximately US$1.6 billion in cash and stock, plus the assumption of US$1.7 billion in net debt.

BARRY CALLEBAUT
Advised on its acquisition of the Ingredients Division of Gertrude Hawk Chocolates, the U.S. leader in specialty inclusions for use in ice cream and baking applications.

B/E AEROSPACE
Advised on the sale of the company to Rockwell Collins, a leading manufacturer of communications and aviation systems, for US$8.3 billion in cash and stock.
**BONTEN**
Advised on its US$240 million acquisition by Sinclair Broadcast Group, one of the largest and most diversified television broadcasting companies in the United States.

**BRIDGEPOINT CAPITAL AND ELEMENT MATERIAL TECHNOLOGY GROUP**
Advised on Element’s £620.3 million acquisition of Exova Group, a global testing, inspection, and certification services provider.

**BUNGE**
Representing in its pending acquisition of a 70% stake in IOI Loders Croklaan.

**CONFIDENTIAL CLIENT**
Advising on the antitrust implications of potential buy-out of JV partner in the United States and Europe.

**ENGIE, WINTERSHALL, SHELL, OMV AND UNIPER**
Advising Engie, Wintershall, Shell, OMV and Uniper on the competition law aspects of the financing and gas transportation arrangements for the high-profile Nord Stream 2 gas pipeline.

**FAIRFAX FINANCIAL HOLDINGS**
Advised on its acquisition of Allied World for approximately US$4.9 billion.

**FIRST EAGLE**
Advising in the envisaged sale of Emin Leydier, a French producer and a European player in the production of corrugated paper and packaging, to the Spanish group S.A Industrias Celulosa Aragonesa (Saica), one of the European players in the development and production of recycled paper for corrugated cardboard.

**HOYA CORPORATION**
Advised the global leader in the eyeglass lens business on its US$476 million acquisition of Performance Optics, an eyeglass lens manufacturer employing over 2,000 people around the world.

**INTERCONTINENTAL EXCHANGE (ICE)**
Advised on the US$650 million acquisition of London-based Trayport, and subsequently, the CMA’s Phase II investigation, the appeals against the divestment order and the £550 million divestment process to TMX Group, which included an asset swap involving TMX Group’s NGX and Shorcan Energy businesses.

Advised on the acquisition by its subsidiary, Intercontinental Exchange Holdings, of a strategic stake in Euroclear from The Royal Bank of Scotland Group for £245 million.

**MAJOR INDUSTRIAL PLAYER**
Represented a major American industrial company on its contemplated joint venture with French and German competitors.

**MAJOR MIDDLE EASTERN CARRIER**
Advising the carrier on all relevant aspects (including antitrust and aviation regulatory) arising from the review of its investment in a significant European airline.

**SOMPO HOLDINGS**
Advised the Japanese insurer on its US$6.3 billion acquisition of the Bahamas-based Endurance Specialty, a global provider of property and casualty insurance and reinsurance.

**SUN PHARMACEUTICALS**
Advised long-time client Sun Pharmaceuticals on all antitrust aspects in connection with its US$175 million acquisition of Odomzo from Novartis.

**TEMASEK**
Advised as a significant shareholder in FinTech company Virtu Financial, on Virtu’s proposed acquisition of independent securities firm KCG Holdings, Inc. for approximately US$1.4 billion.
Algorithms and the use of Artificial Intelligence (AI) have become commonplace in a vast number of markets, and this has drawn the attention not only of competition law academics and practitioners, but also of competition authorities. These authorities have expressed their concerns over the use of these algorithms to engage in anti-competitive practices.

Continued overleaf
Commissioner Vestager has named “the risk that automated systems could lead to more effective cartels” as one of the future challenges for cartel enforcement.1

**ALGORITHMS AS MONITORING TOOLS FOR CARTEL ENFORCEMENT**

Algorithms can monitor competitors’ behavior in the market, and this can be used as a facilitator of the implementation of cartels and the application of retaliation measures. In this case, humans agree on anti-competitive behavior and subsequently implement the cartel and monitor its implementation using algorithms that can instantly identify deviations and apply retaliation measures.

This case should not present any assessment challenge to competition authorities. There have already been good examples of decisions that show how competition law, as it stands, can deal with algorithms: the Poster and Frames cases in the United Kingdom and the Topkins case in the United States.2 In these two cases, competing online sellers had agreed not to undercut each other’s prices and implemented this agreement through automated repricing software that automatically set the prices of the products so as to stay in line with other online sellers, which restricted price competition between the online retailers on Amazon. The parameters of the anti-competitive conduct seen in these cases are not new. The only novel element is the use of a more sophisticated tool to monitor the correct implementation of the agreement. Anti-competitive agreements are caught by Article 101 Treaty on the Functioning of the European Union (TFEU), irrespective of the instruments used for their implementation.

**‘HUB AND SPOKE’ CARTELS**

In these type of cartels, the competing firms use a common third-party algorithm (as the hub) to determine pricing and react to changes in the market, which in turn generates a collusive structure, i.e., the ‘hub and spoke’ cartel. The underlying concern here is that the enhanced use of algorithms will increase the number of possible scenarios where this ‘hub and spoke’ structure can exist, and competitors will trust that, because they all use the same third-party algorithm, the market will lack any uncertainty or competition.3

For the time being, the most similar case to a hub and spoke cartel at the European Union level is the Eturas case.5 Following a reference for a preliminary ruling of the Lithuanian Supreme Administrative Court, the Court of Justice of the European Union (CJEU) provided some guidance on the concept of a concerted practice and the elements that should be taken into account to assess whether a concerted practice has been implemented when economic operators use a common computerized information system.6

The Lithuanian Competition Authority found that several online travel agencies had infringed competition law by limiting the possibility of applying discounts of more than 3% when using the Eturas online travel booking system. In turn, Eturas was considered to have played the role of a facilitator in the implementation of the infringement. The Eturas system sent a message to the online travel agencies inviting them to cap the discount rates for travel bookings and informing them that the platform would undergo a technical modification, whereby any discounts in

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excess of the cap would be automatically reduced. Evidence showed that the message, although available in the Etras system, was only accessed by two companies, and there had not been any further reaction to the message by the online travel agencies. The restriction in question did not prevent operators from providing higher discounts, but the travel agencies concerned had to take additional technical steps in order to do so.

The Lithuanian Competition Authority had initially considered that the travel agencies: (i) “could reasonably assume that all the other users of that system would also limit their discounts to a maximum of 3%” and (ii) had showed no objection to the proposed limit of discounts. The CJEU, on the other hand, held that the concept of a concerted practice implies concertation among the companies at hand and consequently their conduct on the market. In this case, if the evidence did not show any awareness, it could not be assumed that the companies participated in a concerted practice, unless there were “other objective and consistent indicia” showing that the companies tacitly agreed to engage in anti-competitive behavior.

**ALGORITHMS AS AUTONOMOUS CARTELISTS**

Other theories of harm suggest that the when a company unilaterally employs algorithms to adapt to market changes and to maximize profits, this conduct could lead to tacit collusion restricting competition in the market. These algorithms are self-learning and through their predictive capacity adapt to market conditions and align prices with those of competitors. For example, pricing algorithms, instead of explicit communication, could be used to signal unilateral pricing intentions. Although unilateral price signaling in the absence of collusion cannot be said to amount to a by object infringement, the European Commission (EC) in the Container Shipping Article 9 commitments decision preliminarily found that unilateral public announcements of a series of general rate increases, which are normally not problematic under competition law, allowed companies to signal future pricing intentions leading to an increase of price, because they were non-binding and made long before the client decisions.

According to the EC, such unilateral, non-binding price increase public announcements were of no value to customers and could therefore amount to an infringement of Article 101 TFEU, even if the EC found no evidence of collusion. Since the commitments decision was adopted under Article 9, it did not allow the EU courts to review whether in the absence of any proof of collusion or awareness, such unilateral price increase announcements could constitute an infringement of Article 101 TFEU. The EC and other competition authorities will face significant challenges in proving that public price announcements amount to a by object restriction in the absence of collusion, and in applying a similar theory of harm to algorithms and the online world.

Another potential anti-competitive conduct would be that of a company that unilaterally applies algorithms to adapt to market changes and to maximize profits. In this scenario, instead of aligning prices, algorithms would, through self-learning, adapt to other commercial behaviors of competitors when this would be the most profitable course of action. This scenario presents difficulties as to the standard of proof and risks unduly stretching competition law concepts. First, Article 101 TFEU does not prevent companies from using information available in the market to “adapt to existing and anticipated conduct of their competitors.” Companies, foreseeing their rivals conduct, are free to change their prices. Second, it is only explicit collusion that is illegal under EU rules. An undertaking will only be held liable for breaching competition law when it “cooperate[s] with … competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success […].”

**CONCLUSION**

Companies should be aware that traditional cartel principles may be easily applied when algorithms can be shown to amount to mere cartel monitoring tools agreed by competitors. However, new theories of harm should be closely monitored by European Courts. For example, claiming algorithms are a means of tacit collusion and a breach of competition law in the absence of any awareness, intention, collusion or implementation mechanisms by competitors will be difficult to reconcile with basic principles of competition law, such as personal liability and standard of proof.
CARGOLUX AIRLINES
Representing in both the application for annulment of the European Commission’s readopted decision in the Air Cargo Investigation and the damages litigation in the United Kingdom before the High Court.

This follows our representation of Cargolux Airlines in the successful annulment of the initial European Commission decision by the General Court in December 2015. The feat resulted in the Air Cargo Investigation winning Global Competition Review’s 2016 “Matter of the Year” and “Global Dispute of the Year: International Litigation” at The American Lawyer’s Global Legal Awards 2016.

CONFIDENTIAL CLIENT
Representing in a cartel investigation by the U.S. Department of Justice.

CONFIDENTIAL CLIENT
Representing in multiple U.S. State Attorneys General investigations.

CONFIDENTIAL CLIENT
Representing in a public procurement cartel investigated by the Italian Competition Authority.

CONFIDENTIAL CLIENT
Representing on a cartel investigation by the Italian Competition Authority.
GS YUASA
Representing in lawsuits by purchasers of lithium ion batteries alleging that leading battery manufacturers participated in a multiyear price-fixing conspiracy.

MAJOR FINANCIAL INSTITUTION
Representing on a number of European Commission investigations into potential cartel conduct in various financial benchmarks and trading markets, including related to foreign exchange and precious metals sectors.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to foreign exchange (FX) trading.

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MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to supranational, sub-sovereign and agency (SSA) bonds.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to the silver market.

MAJOR FINANCIAL INSTITUTION
Representing in litigation regarding the challenge to network and card-issuers’ conduct with respect to setting and applying interchange fees and various payment-card network rules.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to alleged manipulation of yen Libor and euroyen Tibor rates.

MAJOR FINANCIAL INSTITUTION
Representing in class action alleging a conspiracy to boycott competition from emerging electronic stock trading platforms and central clearing institutions in the stock loan market.

MAJOR FINANCIAL INSTITUTION
Representing in a civil antitrust action alleging that several banks conspired to boycott an upstart platform for trading credit default swaps.

MAJOR FINANCIAL INSTITUTIONS
Representing numerous major financial institutions in investigations related to Libor.

MAJOR FINANCIAL INSTITUTION
Representing in DOJ Fraud Section and DOJ Antitrust Division investigation.

MAJOR SOLAR PANEL MANUFACTURER
Representing in a predatory pricing matter where the U.S. Supreme Court denied plaintiff’s petition following the Sixth Circuit affirming a district court’s dismissal with prejudice of an action claiming more than US$1 billion in damages arising out of alleged collusion between Chinese solar panel manufacturers.

MCGRaw-HILL EDUCATION
Representing a major U.S. publisher in an investigation by the Spanish Competition Authority of the market for non-university textbooks.

RubyCon
Representing the third-largest Japanese capacitor maker in a DOJ criminal investigation with parallel civil class actions and direct action lawsuits.

Two major financial institutions
Representing in antitrust class actions relating to the Canadian Dealer Offered Rate.

Two major financial institutions
Representing in antitrust class actions relating to U.S. Treasury securities.

Two major financial institutions
Representing in antitrust class actions relating to the ISDAfix benchmark rate used for interest rate derivatives transactions.
Divining trends in antitrust enforcement in a given presidential administration can take some time. Many commentators didn’t notice material changes in antitrust enforcement in the Obama administration – at least in merger enforcement – until the summer of 2011, when the Antitrust Division of the Department of Justice (DOJ) brought suit challenging AT&T’s acquisition of T-Mobile, more than two years into President Obama’s term. However, in the early tenures of antitrust enforcers appointed by President Trump, there are indicators worth watching to see whether and to what extent they are harbingers for antitrust enforcement.

Continued overleaf
Antitrust Enforcement Under the Trump Administration

At the DOJ, newly appointed Assistant Attorney General (AAG) Makan Delrahim has provided some clues about how the DOJ under his leadership will approach antitrust issues at the intersection of antitrust and intellectual property, merger enforcement and the DOJ’s use of consent decrees generally. At the Federal Trade Commission (FTC), the direction of change will be less certain until a Trump nominee has been confirmed. AAG Delrahim was nominated in late March 2017 and assumed office, following confirmation by the Senate, in late September 2017. In this fairly short period as AAG, Delrahim has already announced a few important changes in enforcement priorities at the DOJ. Befitting his status as the first registered patent lawyer to head the Antitrust Division, one of Delrahim’s first public speeches about the DOJ’s enforcement priorities touched on the role of antitrust law in the context of standard setting organizations (SSOs) and their policies regarding patents. Delrahim expressed concern that antitrust enforcers had strayed too far in the direction of accommodating the concerns of technology implementers over IP creators. Rather than focus on the patent ‘hold up’ problem, in which an IP licensor threatens to delay licensing until its royalty demands are met, Delrahim said that the more serious impediment to innovation is the ‘hold out’ problem, which arises where technology implementers underinvest in the implementation of a standard, or threaten not to take a license, until their royalty demands are met. Delrahim expressed skepticism about using antitrust law to address the hold up problem, noting that common law and non-antitrust statutory remedies are adequate remedies for SSOs and their members. Interestingly, while the DOJ had issued an influential business review letter regarding an SSO’s revised patent policy in 2015, during and prior to the Obama administration, the FTC had been more active than the DOJ in using the antitrust laws to address SSO issues. However, the AAG has a significant bully pulpit on any issues involving antitrust, even if the law continues to develop outside of the DOJ’s purview (e.g., in private actions).

In perhaps the most notable action taken in Delrahim’s tenure, the DOJ challenged AT&T’s proposed $85.4 billion acquisition of Time Warner. In the Obama administration, a few vertical deals (transactions between parties in the same value chain), including Comcast’s acquisition of NBC Universal, were approved subject to behavioral remedies prohibiting, among other things, discriminatory and retaliatory behavior and practices. Delrahim, in a November 2017 speech at the ABA Antitrust Fall Forum, expressed skepticism about behavioral remedies, saying that they supplant competition with regulation, require companies to make decisions contrary to their profit-maximizing incentives and demand more ongoing monitoring than structural decrees. Additionally, Delrahim noted that the DOJ has found it difficult to enforce behavioral remedies given the “exacting standards of proving contempt.”
Less than a week after the speech, the DOJ challenged AT&T/Time Warner, reportedly after rejecting an 11th-hour behavioral settlement offer from AT&T, marking the first time the DOJ (or the FTC) has challenged a vertical deal in decades. Delrahim’s statement on behavioral remedies reflected a view that may have been crystallizing at the DOJ regarding the difficulty of enforcing behavioral remedies. Notably, President Trump made a statement during the campaign that his administration would block AT&T/Time Warner. However, it is quite possible that a DOJ in a hypothetical Hillary Clinton administration may have reached the same result. Neither the DOJ’s vertical theory of harm asserted in AT&T/Time Warner nor the disfavoring of behavioral remedies are novel viewpoints. What remains to be seen is how Delrahim’s skepticism of behavioral remedies will affect other vertical mergers the DOJ is reviewing. The disfavoring of behavioral remedies could lead to an increase in challenges to vertical deals, or it could lead to more vertical deals being allowed to proceed without any conditions (or a challenge). Given the idiosyncratic context of AT&T/Time Warner and the recency of Delrahim’s speech, it would be prudent to see how the DOJ approaches similar vertical transactions in the future before drawing too many conclusions.

While AT&T/Time Warner provides some clues as to how the Trump era antitrust enforcers will approach vertical transactions, there is less evidence about how the DOJ or FTC may change antitrust enforcement towards horizontal transactions, which, of course, leaves room for speculation. In the latter years of the Obama administration, many observers saw at least two major changes in the substantive standard used to weigh whether transactions would substantially lessen competition. The enforcement agencies were (1) lowering the concentration thresholds at which they decided to intervene in a transaction; and (2) giving less credit to parties’ efficiency arguments. Additionally, the enforcement agencies were seen as requiring more stringent remedies, e.g., by trending towards favoring the divestiture of entire operating units rather than more limited products and by taking a stricter view of financial viability of divestiture buyers. It remains to be seen which of these enforcement trends will be reversed in a Trump administration.

In the same speech about behavioral remedies, Delrahim provided some general thoughts about the DOJ’s approach to consent decrees. He said that settlements should be simple and administrable, should avoid usurping regulatory functions and should preserve economic liberty and preserve the competitive process. He signaled an intention to improve the enforceability of consent decrees, mentioning a new provision that the DOJ will seek to put in decrees in which parties will agree that alleged violations will be judged under a preponderance standard, rather than the more rigorous contempt standard. As no Trump FTC nominee has yet been confirmed, the direction of potential change is not yet as evident at the FTC. But acting FTC Chairman Maureen Ohlhausen has announced her intention to streamline the FTC’s information requests during its investigations, and it’s likely that Joe Simons, if and when confirmed as Chairman, will continue that approach. In a speech at the American Bar Association’s Antitrust Fall Forum in November 2017, Donald Kempf, the Antitrust Division’s Deputy Assistant Attorney General for Litigation, made a similar pronouncement that the DOJ would also seek to reduce the burden on parties involved in investigations.

DISFAVORING OF BEHAVIORAL REMEDIES COULD LEAD TO AN INCREASE IN CHALLENGES TO VERTICAL DEALS

As no Trump FTC nominee has yet been confirmed, the direction of potential change is not yet as evident at the FTC. But acting FTC Chairman Maureen Ohlhausen has announced her intention to streamline the FTC’s information requests during its investigations, and it’s likely that Joe Simons, if and when confirmed as Chairman, will continue that approach. In a speech at the American Bar Association’s Antitrust Fall Forum in November 2017, Donald Kempf, the Antitrust Division’s Deputy Assistant Attorney General for Litigation, made a similar pronouncement that the DOJ would also seek to reduce the burden on parties involved in investigations.
It has been a year since Article 50 was triggered on March 29, 2017, and if no extension is given, the U.K. will leave the European Union (EU) on March 29, 2019. This means that negotiations are now at the half-way point, but we are still no closer to figuring out what *Brexit means Brexit* actually means. This article provides an overview of the potential post-Brexit competition landscape as envisaged by the U.K. Competition and Markets Authority (CMA) and the U.K. Competition Appeals Tribunal (CAT) and outlines some of the options open to the U.K. with regards to its trading relationship with the EU and the rest of the world.

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The Prime Minister has confirmed that the U.K. will leave the single market and take the ‘hard’ Brexit route, with no deal being considered to be a better option than a bad deal. Even though the U.K.’s future partnership with the EU is yet to be determined, in the 2017 Autumn Budget the CMA was given an extra £2.8 million to spend each year to ensure that the U.K. has the robust and effective competition system that it needs after Brexit. The CMA, however, disputes that this funding is specifically for Brexit, as it would need significantly more funding than this, post-Brexit, in order to manage its anticipated increase in workload for both antitrust and merger cases.

**ANTITRUST**

In its written evidence to Parliament, the CMA stated that post-Brexit it would require additional resources to conduct parallel antitrust investigations where the European Commission (EC) is also investigating the same or similar conduct at an EU level. The CMA recognizes that the burden on businesses involved in such investigations could be minimized if the U.K. and EU practices and procedures remain the same. However, both the CMA and the CAT proposals may lead to a divergence with regards to substantive law. Currently, U.K. competition law is based on EU law. Post-Brexit, both the CMA and CAT propose that there should only be an obligation to “have regard to EU law and precedent” (rather than the current obligation where they have to apply U.K. law in a way that is consistent with EU law). Consequently, this would give the U.K. freedom to depart from EU law where it sees fit. This, however, could lead to a company being dealt with differently, for the same behavior, across the different sides of the Channel. In practice, given the CMA and CAT appetite for continued U.K.-EU cooperation, it is unlikely that there would be a significant substantive divergence in the law, but this proposal could help appease the so-called Brexiteers that are concerned with being bound by the jurisprudence of the European courts.

**MERGERS**

Since the U.K. merger regime is voluntary, it is likely that, post-Brexit, companies will only notify a merger to the U.K. if there could be potential competition concerns in the U.K. Assuming that the U.K. merger control rules do not change, the CMA estimates that it would need additional resources to manage approximately 30 to 50 additional phase 1 mergers each year. The CMA notes that many large companies already have to file mergers in several jurisdictions, so it does not envisage that an additional filing in the U.K. will be cumbersome. Because the various merger filings would all have to be coordinated (both by the companies merging and the authorities), the CMA would need to have a framework for cooperation with the EU and also with non-EU countries, as the U.K. will likely no longer be able to rely on the EU’s existing cooperation agreements.
STATE AID AND TRADE

The CMA has not commented on the future of State aid, because it considers this a matter for the government. The four potential options for the U.K. are:

- **Brexit with a negotiated free trade agreement where the U.K. is a member of the European Economic Area (EEA):** In this scenario the U.K., like Norway, would participate in the single market as a member of EEA, which replicates EU State aid and trade rules. Therefore, this would maintain the status quo.

- **The U.K. joins the European Free Trade Association (EFTA), but not the EEA:** This would be modelled on the relationship that Switzerland has with the EU. In Switzerland, there is no State aid control except in relation to the air transport sector, which means that there would have to be a negotiation on which industries should be captured under these rules. Since the U.K. has historically not been in favor of providing public funding to companies, it is not clear where the lines will be drawn.

- **There is ‘no deal’:** In a ‘no deal’ scenario, the U.K. would be bound by the World Trade Organization (WTO) rules, which would generally permit financial contributions to companies. This would involve a more ‘hands-off approach’ compared to EU rules, because the WTO rules are reactive in nature; this means that the rules are only triggered if a member country lodges a complaint. While the WTO rules provide more freedom for State intervention, the U.K. has in the past spent few resources supporting businesses compared to other EU countries. For example, in 2015, the U.K. spent 0.35% of GDP on State aid schemes (excluding railways), while France spent 0.62% and Germany spent 1.22%.

- **‘Canada-Plus Plus Plus’ deal:** This would involve a Free Trade Agreement (FTA) modeled on the one agreed between the EU and Canada but with additional provisions such as the free movement of services. The European Council guidelines for the Brexit negotiations make it clear that the U.K. would still need to establish common ground with the EU in relation to State aid. Therefore it is likely that the U.K. would still be bound by rules controlling the granting of State support for ‘Canada-Plus Plus Plus’ and the other options outlined above.

When it comes to trade, the U.K.’s concept for a ‘Canada-plus plus plus’ deal is still evolving. But while a U.K.-EU FTA will govern arrangements between the U.K. and EU Member States, it will not give the U.K. access to any of over 30 trading arrangements that have been negotiated between the EU and third-party states. These will have to be separately negotiated once the U.K. is no longer a member of the EU.

If no deal is reached, the U.K. will revert to the default position under the WTO rules, which set out the basic international framework for the U.K. to trade with over 160 WTO members. One key difference with EU law is that the WTO does not police regulatory divergence (with the exception of intellectual property law) as it does not seek to create harmonized national regulations to achieve market integration. Rather, the WTO rules prevent discrimination against imported products. This means that, if there is no FTA with the EU, the EU will have to treat the U.K. the same way it treats other WTO members that also do not have FTAs with the EU. Consequently, even in a no deal scenario, EU tariffs will apply to the U.K. on a most favored nation basis after Brexit and vice versa.

Essentially, while the U.K. will have a degree of freedom to develop its competition policy after Brexit, competition and trade are two areas where it will not be able to meaningfully **take back control** from the EU.

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The growth of e-commerce and the resulting increase in price transparency and price competition have a significant impact on companies’ distribution strategies and consumer behavior. While the emergence of e-commerce has the potential to lower prices, reduce barriers to entry and increase consumer choice and transparency, the e-commerce sector inquiry (SI) has noted that manufacturers have become more concerned about homogeneity of prices and consistency in brand image online.

Continued overleaf
Vertical Agreements in the Online Sales of Goods

Distribution agreements with online retailers raise a number of specific issues for manufacturers, such as how to address free-riding, how to maintain or establish certain brand image or how to ensure a high level of distribution quality. E-commerce and the implementation of distribution networks online facilitate the monitoring of resale prices (RPM), but also the introduction of online restrictions on resellers (online marketplace bans), and most favored nation (MFN)/price parity clauses.

In light of these risks specific to the e-commerce sector, vertical agreements and online distribution systems have experienced a wave of investigations by the European Commission (EC) in 2017 (whereas the last infringement decision on vertical agreements was in 2004) in sectors ranging from consumer electronics manufacturers to video games, from hotel booking to luxury and sports clothing. This article focuses on the most recent cases and their impact on the obligations on resellers in the online sale of goods.

**Price Limitations and Recommendations**

**RPM**

E-commerce and its increased price transparency facilitate detection of retailers that deviate from the manufacturer’s recommended prices and may limit the incentives for retailers to deviate from such pricing recommendation. It is not illegal in itself to monitor resale prices, but manufacturers should not take actions that interfere with the freedom of retailers to set their final prices to customers by making a recommended retail price or a maximum retail price equivalent to minimum or fixed price.

In this context, the EC launched RPM investigations in 2017 against consumer electronics manufacturer Asus, Denon & Marantz, Philips and Pioneer. According to the EC’s preliminary view in the opening decision, these may have restricted the ability of online retailers to set their own prices. The EC noted that the effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, one retailer’s use of RPM may spread high prices on to other retailers that may not be engaged in similar RPM and affect overall online prices for the respective consumer electronics products.

National Competition Authorities (NCAs) in countries such as the U.K., Germany and France are also very active on RPM, such as the £2.7 million fine imposed by the CMA on a supplier of domestic light fittings in June 2017 for restricting online prices.
The development of sales platforms such as Amazon has triggered the use of MFN clauses that assure the platform that the supplier will not sell its products at better terms via another platform. These practices, however, may facilitate collusion and reduce incentives for online retailers to develop innovative services or alternative business models, lower their commission rates, etc.

In May 2017, the EC made binding a set of commitments offered by Amazon in an investigation concerning MFN clauses contained in Amazon’s distribution agreements with e-book publishers in Europe. The clauses required publishers to offer Amazon similar or better terms and conditions as those offered to its competitors, and to inform Amazon about more favorable or alternative terms given to Amazon’s competitors. The clauses covered all practices that competitors use to differentiate themselves from Amazon, such as price, alternative distribution models, innovative e-books and promotions.

Amazon offered a number of commitments to address the EC’s concerns, including offering not to enforce or introduce such clauses during the following five years. The commitments are particularly related to alternative/new business models, release date and catalogue of e-books, features of e-books, promotions, agency price, agency commission and wholesale price. Amazon will also allow publishers to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform.

MFNs are not necessarily problematic in distribution agreements. The assessment of the competitive impact of such clauses will depend on the market position of the parties, the characteristics of the market and the manner in which the MFN clause is implemented. NCAs have also been active in relation to MFN clauses and have adopted different approaches. For example, in the case of price parity clauses used by online travel agents in their contracts with hotels, Germany’s Bundeskartellamt has adopted a prohibition decision, whereas the French, Italian and Swedish NCAs pursued a commitments approach.

In September 2017, the CMA launched an investigation for the use of MFN clauses in price comparison websites in relation to home insurance products.

MANUFACTURERS SHOULD NOT TAKE ACTIONS THAT INTERFERE WITH THE FREEDOM OF RETAILERS TO SET THEIR FINAL PRICES TO CUSTOMERS

QUALITY CONTROL: PROTECTION OF A BRAND IMAGE

LIMITATION TO SELL CROSS-BORDER

The EC is particularly concerned by geo-blocking and launched an investigation in 2017 on bilateral agreements concluded between Valve Corporation and five PC video game publishers. The EC is assessing whether their online sales practices prevent consumers from enjoying cross-border choice and buying video games at competitive prices. In June 2017, the EC also opened several investigations into the distribution practices of Nike, Guess, Sanrio and Universal Studios to assess whether they restrict retailers from selling cross-border to consumers within the EU Single Market.

CONTINUED >
In addition, in November 2017 the European Parliament, the Council and the EC reached a political agreement on a proposed Regulation to end unjustified geo-blocking for consumers wishing to buy products or services online within the EU. The proposed Regulation, which will come into effect at the end of 2018, should boost e-commerce for the benefit of consumers and businesses that take advantage of the growing European online market.

**ONLINE MARKET PLACES BANS**

Can a manufacturer operating a selective distribution system prohibit its authorized retailers from selling its products online via third-party platforms (such as Amazon)? On the specific case of luxury goods, the Court confirmed in the Coty judgment in early December that a selective distribution system aiming at preserving the luxury image of its goods is compatible with Article 101 TFEU as long as the resellers are chosen on objective and uniformly expressed criteria which do not go beyond what is necessary.

Importantly, the Court confirmed the principle in Pierre Fabre that given their characteristics and nature, luxury goods may require the implementation of a selective distribution system in order to preserve their quality.
In relation to the question of whether banning the use of third-party platforms for the internet sale of luxury goods is compatible with Article 101 TFEU, the Court indicated that a prohibition of the kind in Coty was an appropriate means for preserving the luxury image of the goods. The Court then concluded that the prohibition did not go beyond what was necessary to preserve the luxury image of those goods.

The Court, however, did not provide for a general test to be applied on selective distribution networks, nor did it define the scope of luxury goods. Sellers will have to demonstrate on a case-by-case analysis that the nature of their products deserves the same level of protection as luxury goods in the Coty case, to preserve its image of prestige and the goods’ quality.

CONCLUSION
Companies remain generally free to set up the distribution system that best serves them, whether online or offline. However, the investigations launched in 2017 show the EC’s increasing focus on the implementation and achievement of the Digital Single Market, and it should be assumed that further sectors will be investigated as regards online distribution agreements. Accordingly, particular attention should be paid when introducing restrictions that limit the means by which, and the places where, the retailer can distribute the relevant products and services.

PRICE COMPARISON TOOLS
Is a restriction on the use of price comparison tools based on objective qualitative criteria? In April 2017, the German Regional Court concluded Asics breached competition law by preventing its retailers from using price comparison tools.12 In January 2017, the CMA also dealt with a ban on listing cars in price comparison tools such as Carwow. BMW eventually changed its policy and allowed its car dealers to use such websites.13

LUXURY GOODS MAY REQUIRE THE IMPLEMENTATION OF A SELECTIVE DISTRIBUTION SYSTEM IN ORDER TO PRESERVE THEIR QUALITY
On December 9, 2016, the PRC National Development and Reform Commission (NDRC) handed down its decision against medical device company Medtronic for having concluded and implemented a vertical monopoly agreement by maintaining fixed- and minimum resale price (RPM). NDRC imposed a fine of CNY118 million, which stood for 4% of the revenue for the products involved, and was one of the highest fines imposed by Chinese antitrust administrative authorities in that year.

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So far, the NDRC has investigated and fined more than 20 domestic and international companies involving a variety of industries, including liquor, infant formula, automobile, lenses and contacts, medical device and household appliance, for RPM conduct. Because the enforcement against vertical monopoly agreement will continue to be a focus of the Chinese antitrust administrative authorities, it is important for companies to have a better understanding of the relevant regulations and enforcement practices to minimize the risks.

**Typical vertical restrictions other than RPM include:** territory restriction, exclusive distribution/supply, tying, etc. Even though these conducts are not explicitly provided as vertical monopoly agreements in the AML, they may still cause problems under the AML.

A company with a dominant market position may breach the AML for abuse of dominance if it imposes vertical restraints. In November 11, 2016, the PRC State Administration for Industry and Commerce (SAIC) penalized Tetra Pac for exclusive arrangement, tying and royalty rebate. SAIC’s decision against Tetra Pac is based on Article 17 (abuse of dominance) rather than Article 14 (vertical monopoly agreement) of the AML. Overall, companies with low market share should be subject to lower risks for imposing vertical restraints other than RPM. But this is not risk free, because assessing the likelihood of being considered dominant can be difficult. Even if a company’s market share is lower than 30%, technically, it may still be deemed to have a dominant market position, as the AML does not provide a safe harbor for abuse of dominance. Not to mention that the antitrust authorities have wide discretion in determining dominant market position.

In addition, resale territory restrictions and single branding restrictions may be deemed as measures to implement RPM if the restrictions are linked with the dealers’ resale prices, as NDRC noted in the Medtronic case. Thus companies should be careful with any link between resale territory or single branding restrictions imposed on dealers and the interference with their resale price.

**Article 14 of the PRC Anti-Monopoly Law (AML) lays out the types of vertical monopoly agreements. Business operators should not conclude agreements with business counterparties to fix resale price, impose minimum resale prices, or conclude other types of vertical monopoly agreements identified by the antitrust administrative agencies.**

Unlike in the U.S. and EU, RPM is the only type of vertical monopoly agreement explicitly provided in the law. Although Article 14 contains a catch-all clause according to which the antitrust administrative agencies can deem ‘other type of agreements’ as vertical monopoly agreement in breach of the AML, the Chinese antitrust authorities are generally cautious in creating new types of infringements that are not explicitly provided in the AML. Currently, none of the Chinese antitrust authorities have penalized companies based on the catch-all clause in Article 14 of the AML.
RPM — PER SE ILLEGAL OR RULE OF REASON?

The basic rules for RPM in China are similar to those in the European Union and the United States: A manufacturer should not fix the resale price of its dealers or restrict the dealers’ minimum resale price; RPM under genuine agent/consignment agreement is lawful, because genuine agent acts in the name of the principal and is not deemed a ‘transaction counter-party’ in the meaning of Article 14; recommended resale price and maximum resale price are generally allowed, unless structured in a way that constitutes RPM or abuse of a dominant market position such as predatory pricing.

In addition, there was a debate in China regarding whether RPM should be per se illegal or should be subject to the rule of reason. The Chinese courts had found in favor of the rule of reason in various civil litigations, requesting that an anti-competitive effect should be an essential element in the finding of monopolistic agreements and that the burden to prove the anti-competitive effects of RPM should lie with the plaintiff. The court would always look into the company’s market power in the relevant market and the competitive restraint from competitors. For the court to deem RPM a vertical monopoly agreement breaching the AML, the plaintiff has to prove that there is insufficient inter-brand competition and that the defendant has considerable market power. The NDRC, as the antitrust administrative authority, holds the view that RPM conducts should be illegal, unless the company can prove its conduct falls under the exemptions under Article 15 of the AML. Whether there is sufficient inter-brand competition in the relevant market did not seem to have a major effect on the NDRC’s decision.

This debate may have ended following an administrative litigation judgment handed down by the Hainan High People’s Court in December 2017. The case was brought up by Yutai Company (a fish feed company) against the administrative decision issued by the Hainan Price Bureau (the Hainan branch of NDRC) in February 2017 for the RPM provisions in the distribution agreement between Yutai and its distributors. The court of first instance followed the rule of reason approach and found that due to Yutai’s limited market presence, its resale price fixing agreements with its distributors had no anti-competitive effect and therefore, did not constitute a monopoly agreement.

However, on appeal, the Hainan High People’s Court reversed the judgement and upheld the Hainan Price Bureau’s administrative ruling. The Hainan High People’s Court ruled that in order to achieve the legislative goals of the AML in preventing monopoly conducts and protecting the interests of the consumers and the general public, administrative enforcement agencies do not need to prove the anti-competitive effect of RPM conducts in antitrust administrative investigations.

The Hainan High People’s Court did not reject the rule of reason theory completely. It reckoned that in order to claim damages caused by monopoly conduct through civil litigations, the anti-competitive effect must be proved by the plaintiff as the basis for further demonstration that the monopolistic conduct caused damages. Thus the burden of proving the anti-competitive effect may remain a hurdle in future civil litigations involving RPM. After this case, it is unlikely that the PRC courts will quash the NDRC’s administrative rulings against RPM based on lack of anti-competitive effect. Considering the NDRC is an active enforcer with significant investigation powers, and considering the enforcement against vertical monopoly agreement will continue to be a focus of the NDRC, companies should be extremely cautious with RPM conduct regardless of their market powers in China and the competition status in the relevant markets.
2017
REPRESENTATIVE MATTERS
COMPLIANCE
**CHEMICAL COMPANY**
Advising on complex joint venture issues.

**CHEMICALS MULTINATIONAL**
Advised in a (vertical) exclusivity arrangement over the supply of a newly developed chemical speciality product for use in the aerospace industry.

**CONFIDENTIAL CLIENT**
Representing in a Japan Fair Trade Commission investigation.

**CONFIDENTIAL CLIENT**
Representing on potential joint venture and teaming arrangements, ranging from project-specific activities to broader strategic transactions.

**CONFIDENTIAL CLIENT**
Advising on a potential joint venture through which it would transfer operational duties over a large portion of its branded convenience stores to its joint venture partner.

**CONFIDENTIAL CLIENT**
Advising on potential communications with competitors regarding U.S. immigration policy positions.

**CONFIDENTIAL CLIENT**
Advising on the new competition law framework in its home jurisdiction— benchmarking the framework against those of mature competition law regimes across the world, mapping competition law risks, identifying the main risks/problematic issues and devising remedies as well as futureproofing the business by conducting compliance trainings.

**JAPANESE CHEMICAL MANUFACTURER**
Represented in a (horizontal) cross license agreement for the development of polymer products, as well as on its distribution agreements in the EU.

**MAJOR CORPORATION**
Conducted a global internal compliance investigation.

**MAJOR FINANCIAL INSTITUTION**
Advising on its participation across multiple industry working groups and industry associations.
UNILATERAL CONDUCT

Large online platforms such as Amazon, Facebook and Google have a strong presence in Europe. Although general competition law principles apply to them, cases concerning online platforms give rise to a lot of novel questions in respect of the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) compared to traditional ‘analog’ markets. Among others, questions arise as to the definition of online platforms for the purpose of antitrust enforcement, the definition of the relevant market and the assessment of market power. Despite these uncertainties in the competitive assessment, competition authorities at both European and national level are increasingly focusing on online platforms.

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ABUSE OF DOMINANCE CONCERNING ONLINE PLATFORMS
IDENTIFYING ONLINE PLATFORMS

There is a wide set of different businesses commonly categorized as online platforms, from online advertising platforms (e.g., Google’s AdSense) to marketplaces (e.g., Amazon), from social media (e.g., Facebook) to search engines (e.g., Google), from transportation businesses (e.g., Uber) to accommodation systems (e.g., Airbnb). This triggers the question as to whether there is a single all-encompassing definition of online platforms. This is relevant for various reasons. First, as online platforms engage in different economic activities (e.g., intermediation of supply and demand as well as supply of products or services to customers), it is important to determine whether there are separate ‘undertakings’ within the meaning of Article 102 TFEU for each activity performed by the online platform. Second, uncertainties as to the boundaries of the notion of online platforms might have an impact on the prima facie competitive assessment and the number of players deemed to be active on the same market, including a finding of market power and abuse. Finally, the European Commission (EC) is attempting to introduce sector-specific regulations that will necessarily require a delimitation of the scope of application.

In order to provide a definition of practical relevance for antitrust enforcement, the Bundeskartellamt (BKartA) has defined online platforms as undertakings providing intermediation services that allow for direct interaction between two or more distinct groups of users connected by indirect network effects. In the BKartA’s view; therefore, an appropriate platform demarcation requires a broad definition of indirect network effects covering both platforms with bilateral positive indirect network effects (e.g., hotel booking platforms) and platforms with unilateral indirect network effects (e.g., advertising platforms).

Conversely, the EC has concluded that “there is no consensus on a single definition of online platforms as a clear-cut definition would likely be too narrow, or conversely apply to a very wide range of internet services.” However, instead of providing a single all-encompassing definition, in its Staff Working Document the EC identifies a number of important characteristics that online platforms generally share, i.e., (i) the capacity to facilitate and extract value from direct interactions or transactions between users; (ii) the ability to collect, use and process a large amount of personal and non-personal data in order to optimize inter alia the service and experience of each user; (iii) the capacity to build networks where any additional user will enhance the experience of all existing users (‘network effects’); (iv) the ability to create and shape new markets into more efficient arrangements that bring benefits to users but may also disrupt traditional ones; and (v) the reliance on information technology.

Although a one-size-fits-all definition seems to be difficult, the definition issue is of utmost importance and requires at least a case-by-case analysis based on predefined characteristics as those identified by the EC.
The question as to whether an undertaking is dominant plays a decisive role in the application of competition law. However, also in relation to the assessment of market power, online platforms present some specifics that need to be taken into account. First, possession of vast amounts of data by online platforms is a factor that might indicate market power, as pointed out for the first time in Facebook/WhatsApp. Indeed, the more detailed data online platforms have, the more knowledge they will acquire about customers, thus enabling them to provide better services at a lower price, which in turn will increase their market power over time. As the former president of the French Competition Authority (FCA) Bruno Lasserre clearly put it, “market power comes from companies’ capacity to collect a large amount of personal data and to use it commercially.”

Second, online platforms have a strong incentive to be first movers due to significant winner-takes-all effects. Third, multi-homing, i.e., the practice of using two or more platforms simultaneously, may have a significant impact on the competitive constraints faced by a platform, thus reducing their market power. Finally, market shares are a less reliable proxy of market power compared to traditional markets. This is because the possibility of disruptive competition is inherent in the digital markets, and a very strong market position could be suddenly challenged if there are low barriers to entering the market, thus leading to dominant firms rapidly losing their ephemeral market power.

Defining the Relevant Market

Although the general principles (substitutability from both demand and supply sides) apply to the definition of the relevant market concerning online platforms, cases involving these businesses may also give rise to novel questions. First, many online platforms are used for free, and since price is traditionally considered an essential competitive parameter, the question arises whether a market exists at all when services are offered completely free of charge. Second, most online platforms are characterized by multi-sided markets, thus the question arises as to whether the two sides of an intermediation platform should be considered as distinct relevant markets or whether the platform offer should be treated as one product. Although in some cases the EC identified a single two-sided relevant market, some competition authorities like the BkartA have called for a case-by-case analysis. Ultimately, this determination is fundamental to the assessment of market power and the competitive constraints faced by online platforms.

Assessing Online Platforms’ Market Power

The question as to whether an undertaking is dominant plays a decisive role in the application of competition law. However, also in relation to the assessment of market power, online platforms present some specifics that need to be taken into account. First, possession of vast amounts of data by online platforms is a factor that might indicate market power, as pointed out for the first time in Facebook/WhatsApp. Indeed, the more detailed data online platforms have, the more knowledge they will acquire about customers, thus enabling them to provide better services at a lower price, which in turn will increase their market power over time. As the former president of the French Competition Authority (FCA) Bruno Lasserre clearly put it, “market power comes from companies’ capacity to collect a large amount of personal data and to use it commercially.”

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Recent Dominance Cases Concerning Online Platforms in Europe

Despite the difficulties and uncertainties faced in the enforcement of antitrust rules vis-à-vis online platforms, both national competition authorities and the EC are becoming increasingly active in these markets. In March 2016, the BkartA announced that it had opened proceedings against Facebook to assess whether the use of terms and conditions in violation of data protection provisions could amount to an abusive imposition of unfair conditions on users, thus breaching German provisions prohibiting abuses of dominance. This is one of the first instances where antitrust law met privacy provisions in a fully fledged probe, which is why it attracted criticism for trespassing on privacy issues. In May 2016, the FCA initiated a sector inquiry on online advertising and data processing, with a view to assessing the competitive situation in that market. In addition, in July 2017 the FCA went a step further and launched a public consultation with the aim of complementing the information already gathered as a result of the inquiry.

At the EU level, the EC is also increasingly focusing on the enforcement of antitrust provisions in digital markets. For example, in June 2017, it fined Google €2.42 billion for abusing its dominant position as a search engine by promoting its own comparison shopping service in its generic search results and demoting the results of its competitors through its generic search algorithms. Furthermore, Google is facing two ongoing probes into its Android mobile operating system and AdSense advertising system, which might come to an end in the near future.

Conclusion

Online platforms pose a number of interesting questions in relation to various aspects of competition law assessments. Competition authorities across Europe are still in search of an approach towards these issues, and such uncertainties raise criticism in light of the need for legal certainty. Significant caution will need to be taken when applying general principles to online platforms, also in light of the fast-moving nature of these businesses.
UNILATERAL CONDUCT

The European Commission (EC) and other national competition authorities (NCAs) have traditionally shied away from investigating allegations of excessive pricing and appearing as price regulators. Commissioner Vestager warned that such investigations should only be commenced with caution. The pharmaceutical sector, however, has recently seen an uptick in excessive pricing investigations, both across Europe and worldwide. Since the EC’s 2008 pharmaceutical inquiry and corresponding inquiries of NCAs, regulators have also instigated other abuse of dominance and anti-competitive agreement probes in the industry.

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EXCESSIVE PRICING, ‘PAY-FOR-DELAY’ AND REBATES:
A NEW ERA OF ENFORCEMENT IN THE PHARMACEUTICAL INDUSTRY
There is an inherent difficulty in identifying the point at which a price becomes ‘excessive.’ Traditionally, the EU courts proposed a two-step test, identifying whether: (i) a difference between costs incurred and prices charged was excessive; and (ii) whether prices were unfair in themselves, or by comparison to other products. The Court of Justice of the European Union (CJEU)’s judgment in AKKA has confirmed that although there is not a single method to determine whether prices are excessive, the comparison of prices between member states is a valid method of doing so, provided any differences are significant and persistent and can therefore be regarded as appreciable. In May 2017, the EC commenced its first pharmaceutical excessive pricing investigation against Aspen, alleging price increases of cancer drugs following the expiration of their patent protection, as well as threats by Aspen to remove such drugs from multiple markets. The medication was old, cheap to produce and little investment had been made on its improvement. In instigating the investigation, Commissioner Vestager commented that although entities should generally be rewarded for producing low-cost, cheap to produce and little investment had been made on its improvement. In instigating the investigation, Commissioner Vestager commented that although entities should generally be rewarded for producing such medication “when the price of a drug suddenly goes up by several hundred percent, this is something the Commission may look at.” All four of the drugs subject to the EC’s investigation together with another drug had been considered in a corresponding investigation against Aspen by the Italian competition authority; fines of €5.2 million were imposed in September 2016, upheld by national courts in August 2017. In October 2017, South African authorities withdrew excessive pricing investigations against Aspen, and the company announced a probe had been commenced against it by the U.K. Competition and Markets Authority (CMA). The U.K. has also seen a recent upsurge in pharmaceutical excessive pricing cases; in December 2016, the CMA imposed fines on Pfizer and Flynn Pharma (FP) of £84.2 million (a record CMA fine) and £5.2 million, respectively, where a de-branded anti-epilepsy drug was sold at excessive price increases of up to 1600% by Pfizer and 2600% by FP. The CMA’s lead investigator in the case noted that there was “no justification” for the price rises, particularly when the “capsules [were] a very old drug for which there has been no recent innovation or significant investment,” also ordering the parties to reduce their prices. The cases have been appealed to the Competition Appeal Tribunal (CAT); submissions were made in late 2017, and judgments have been reserved. Shortly after the Pfizer decision, the CMA issued a statement of objections (SO) to Actavis, amended in August 2017 to include Intas Pharmaceuticals and Accord Healthcare, alleging prices increases for 10 mg and 20 mg hydrocortisone tablets by over 12,000% and 9,500%, respectively. The CMA also issued an SO to Concordia in November 2017, provisionally finding a 6,000% price increase in a thyroid drug despite its stable production costs; per pack, costs of the drug were preliminarily found to have increased by almost 57 times between 2007 and 2017.

There is therefore an indication of a global uptick in excessive pricing cases, which seem to fall in line with a distinct pattern—investigations into off-patent medicines used for the treatment of limited patient populations, with a longstanding presence on the market and minimal to no R&D investment.

**OTHER INVESTIGATIONS**

Prior to its 2008 inquiry, the EC had only found one abuse of dominance in the pharmaceutical industry against AstraZeneca, which in 2005 was found to have abused its dominant position by misusing patent and regulatory systems to exclude new entrants from the market. Other NCAs have followed suit more recently: The CMA in May 2017 issued an SO against Merck Sharp & Dohme, alleging that its offer of discounts on the infliximab drug was an abuse of dominance, likely to restrict competition from biosimilar copies of the drug. In December 2017, the Romanian authorities commenced proceedings against Roche, claiming it had abused its market power in tenders for drug supplies to hospitals.

More recent cases against pharmaceutical companies by the EC have included the 2014 Servier case, which found the company to have breached Article 102 TFEU by acquiring technology allowing generic drug manufacturers to produce products without breaching Servier’s patents, thereby closing their avenues to entry. Servier had also been found to breach Article 101 TFEU by concluding settlement agreements with generic manufacturers, which agreed in return for payments to restrain their product from entering the market before expiration of Servier’s patent. Such ‘pay-for-delay’ agreements were also held to be unlawful in the EC’s case against Lundbeck and generic drug manufacturers in 2013, imposing fines totaling approximately €110 million. The nature of such agreements as infringements of Article 101 TFEU by effectively amounting to market sharing agreements was further upheld by the General Court (GC) in September 2016.

Lundbeck’s pending appeal to the CJEU, as well as Servier’s pending appeal before the GC, will be instructive on how the EC will classify ‘pay-for-delay’ agreements in the future. Nonetheless, the CMA already has a track record of finding such agreements to be anti-competitive: In February 2016, it imposed a fine of £45 million on GlaxoSmithKline and others for entering into ‘pay-for-delay’ agreements, on the basis that they deprived the U.K. National Health Service (NHS) of price reductions that would otherwise arise from earlier entry of generic medicines (the case was appealed to the CAT, with a judgment pending). The CMA also issued an SO in March 2017 against Actavis and Concordia for entering into a ‘pay-for-delay’ agreement for three years.

**CONCLUSION**

It remains to be seen whether the prevalence of excessive pricing and other contentious investigations in the pharmaceutical sector will continue. Recent EU court guidance on when prices can be classified as ‘excessive,’ worldwide antitrust probes against pharmaceuticals and more general national pharmaceutical sector inquiries (as commenced, for instance, by France’s competition authority in November 2017) may incentivize the EC and NCAs to push on with such cases. Pharmaceutical companies should therefore be wary of regulator investigation, particularly when divesting longstanding off-patent products or entering into agreements with generic drug manufacturers.

Investigations may also shed light on another outstanding question: whether abusive behavior in the pharmaceutical sector should be managed by antitrust regulation at all, or if sector-specific regulation is preferable. In the U.K., new legislative proposals seek to allow the Health Minister to require companies to reduce prices of generic drugs, in addition to existing regulation on the sale of branded medicines to the NHS. The potential support for any such movements will ideally be drawn out through the many pending pharmaceutical sector investigations and inquiries across the globe.

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**Citations:**

5. UK Competition and Markets Authority Press Release “CMA fines Pfizer and Flynn £90 million for drug price hike to NHS.”
7. Case COMPIAT 396/12 – Perindopril (Servier).

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**Further Reading:**

- Commission also published decisions sanctioning Chinese pharmaceutical companies for excessive pricing of off-patent products in August 2017.
- There is therefore an indication of a global uptick in excessive pricing cases, which seem to fall in line with a distinct pattern—investigations into off-patent medicines used for the treatment of limited patient populations, with a longstanding presence on the market and minimal to no R&D investment.
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UNILATERAL CONDUCT

In perhaps the most hotly anticipated judgment in the European competition law world this year, the Court of Justice of the European Union (CJEU) handed down its landmark ruling on September 6, 2017 in Intel’s appeal against its €1.06 billion European Commission (EC) fine for abuse of dominance. The judgment marked a rare defeat for the EC, setting aside the General Court’s judgment upholding the EC’s fine and referring the case back for further analysis. In the process, the CJEU clarified that the rebating practices in question (so-called exclusivity rebates) cannot be found unlawful unless they are actually capable of producing anti-competitive effects. It remains unclear what a dominant company needs to do to show whether a rebate is capable (or not capable) of producing such effects.

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THE INTEL RULING:
A NEW DAWN?
The *Intel* Ruling: A New Dawn?

**BACKGROUND**

The *Intel* case originates from a formal complaint submitted in 2000 by Intel’s competitor, AMD, alleging that Intel had been engaging in an anti-competitive strategy to foreclose AMD from the market in x86 central processing units (CPUs). In July 2007, the EC sent a statement of objections to Intel outlining its concerns that Intel had, among other things, provided substantial rebates to various Original Equipment Manufacturers if they obtained all or the great majority of their CPU requirements from Intel. The EC went on to issue the record-setting fine in 2009, concluding that Intel had granted *de facto* exclusivity rebates to strategically important customers with the intention of excluding its competitors. The EC considered that, pursuant to previous case law, the rebates were abusive *per se* and therefore by their nature capable of restricting competition and foreclosing competitors. The EC did, however, conduct an additional assessment of the effects on competitor foreclosure, as an ‘as-efficient competitor test’ (AEC Test).

Intel challenged the EC’s decision before the General Court, arguing that the AEC Test carried out by the EC failed to establish that the rebates at issue were capable of foreclosing as-efficient competitors. In 2014 the General Court, relying on its reading of earlier case law, upheld the fine and agreed with the EC that such exclusivity rebates were necessarily illegal and that there was no need for the EC to investigate whether there had been market foreclosure. It was therefore not necessary for the Court to review the EC’s application of the AEC Test.

**CJEU JUDGMENT**

The CJEU rejected the notion that exclusive rebates are illegal *per se*, but rather there is a rebuttable presumption of illegality. A company under investigation may therefore adduce evidence that its conduct was not capable of restricting competition and producing the alleged foreclosure effects. The Court describes the (non-exhaustive) circumstances the EC should consider:

- The extent of the undertaking’s dominant position on the relevant market.
- The share of the market covered by the challenged practice.
- The conditions and arrangements for granting the rebates in question, their duration, and their amount.
- The possible existence of a strategy aiming to exclude from the market competitors that are at least as efficient as the dominant undertaking.

However, the Court gives little guidance as to the extent, nature and quality of the evidence required in order to successfully rebut the presumption. It is also important to note that the judgment does not oblige the EC to conduct a full economic analysis in every case but rather to consider any evidence adduced by a party.

**THE AEC TEST CARRIED OUT BY THE EC FAILED TO ESTABLISH THAT THE REBATES AT ISSUE WERE CAPABLE OF FORECLOSING AS-EFFICIENT COMPETITORS**
The judgment is the first case to confirm that an effects-based analysis is admissible in conditional rebate cases and may signal a shift to a more effects-based approach to abuse of dominance cases going forward. It also raises the wider question about the role of presumptions of illegality in competition law cases outside of dominance, for example infringements ‘by object’ under Article 101.

PROCEDURAL IRREGULARITIES

Another important aspect of the CJEU’s judgment relates to alleged procedural irregularities by the EC during the original administrative procedure. While this ground was not ultimately successful in overturning the General Court’s conclusion that the administrative procedure was not vitiated by the irregularity, the CJEU’s comments regarding the EC’s behavior will have significant implications in practice.

Intel had argued before the General Court that its rights of defense had been breached as a result of the EC’s failure to record the content of a meeting with a very senior executive of Dell, Intel’s largest customer. The General Court held that the meeting did not constitute ‘formal’ questioning for the purposes of Article 19 of Regulation 1/2003, and therefore the EC was not required to organize the meeting as a formal interview for the purposes of Article 19(1) of Regulation 1/2003 or Article 3 of Regulation 773/2004. The General Court further held that the EC had in any case remedied that initial omission by disclosing the non-confidential version of an internal note relating to that meeting to Intel.

The CJEU found that the distinction drawn by the General Court between formal and informal interviews was incorrect in law, and the EC is required to record any interview it conducts under Article 19 of Regulation 1/2003. The CJEU also held that the General Court had erred in finding that the EC had remedied its error by disclosing the internal note of the meeting to Intel. Although the note contained a brief summary of the subjects addressed during the interview, it did not contain any indication of the content of the discussions that took place during that interview, in particular the nature of the information provided during that interview.

The CJEU’s judgment in this regard is likely to have a significant impact on the way the EC conducts its investigations in antitrust cases going forward. In particular, it will need to demonstrate a more formalized and transparent approach, as is already the case in merger investigations. Parties should pay particular attention to the way the EC conducts its official meetings and state of play meetings in antitrust cases in the future, as well as disclosure of minutes of third-party meetings and interviews.

KEY PRACTICAL TAKEAWAYS

Commentators and companies alike will now look to the EC’s upcoming decision in its investigation into rebates granted by Qualcomm to see how the EC will respond to the Intel judgment in practice. However, the impact of Intel on the EC’s substantive assessment may be limited, given that the EC regularly does now demonstrate anti-competitive capabilities in its decisional practice.

From a practical perspective, firms that hold a dominant position (or close to a dominant position) will need to contemporaneously assess whether the rebates they are considering could foreclose an as efficient competitor. It will be important to provide strong evidence early in the administrative procedure to rebut the presumption of illegality. In a speech at the CRA conference in Brussels on December 12, 2017, Johannes Laitenberger, Director-General of DG Competition, stated that "placing the burden of rebuttal on the dominant firm encourages it to put forward its best evidence early in the process. Indeed that is in the firm’s interest if it has a good case."

CONCLUSION

Regardless of the merits of the CJEU judgment, it’s notable that our legal infrastructure has still not delivered definitive judgment on a case that is already 17 years old. Indeed, the retrial at the General Court and (almost inevitable) subsequent appeal back to the CJEU mean that definitive judgment is still years away. When the complaint that triggered this case was first made, Google was only two years old and Facebook wouldn’t exist for another four years. Without criticizing any actor in this case, it is hard to see how such timescales are serving anyone’s interests well.
MAJOR DISTRIBUTED SOLAR ENERGY COMPANY

Representing in litigation regarding the monopolization of the market for the retail sale of electricity in the Phoenix, Arizona metropolitan area.

MEDIASET

Advising on the development and impact of EU regulatory reform on privacy in electronic communications with a view to granting an equitable level of consumer protection and transparency across all delivery platforms.

MULTIPLE CLIENTS

Advising in connection with the current European Commission investigation concerning Android.
This past year has seen renewed challenges to reverse payment settlement agreements in the pharmaceutical industry. Since the Supreme Court’s Actavis decision in mid-2013, potentially anti-competitive agreements are reportedly down, enforcement continues and more plaintiffs are seeing success as private class actions move forward at both the class certification and summary judgment stages.

Continued overleaf

REVERSE PAYMENT PATENT SETTLEMENTS IN THE PHARMACEUTICAL INDUSTRY:
A YEAR IN REVIEW
This trend is expected to continue into 2018 amid a greater number of patent settlements but fewer (or none) with any potential reverse payments. Despite the trend that the industry is reducing (or halting) its use of reverse payment settlements, we expect: (1) new litigation will begin and ongoing litigation will continue as it relates to pre-Actavis settlement agreements; and (2) new litigation centered on post-Actavis settlements will be much less prevalent in 2018 and on a going-forward basis.

EFFORTS APPEAR TO FINALLY BE RESONATING BOTH WITHIN THE INDUSTRY AND IN THE FEDERAL COURTS

U.S. FEDERAL TRADE COMMISSION ENFORCEMENT EFFORTS

The Federal Trade Commission’s (FTC) relentless pursuit of reverse payment settlements continued in 2017 with ongoing litigation and a report showing that allegedly anti-competitive reverse payment settlements were down for the second consecutive year after the Supreme Court’s seminal Actavis decision. The FTC’s decades-long efforts appear to finally be resonating both within the industry and in the federal courts—even Chairwoman Maureen Ohlhausen recently stated that “it may be that we have finally started to turn the corner” on reverse payment settlements. As it stands, the FTC continues to vigorously litigate.


**FTC v. Actavis, Inc.: AndroGel:** The FTC challenged the patent settlement between Solvay Pharmaceuticals, Inc. (Solvay) and three generic manufacturers, including Watson Pharmaceuticals, Inc. (later acquired by Actavis, Inc.), regarding Solvay’s branded testosterone-replacement therapy drug AndroGel. The FTC alleged that simultaneously with the settlement, Solvay entered into side deals designed to funnel value to the generic manufacturers in exchange for their agreement to delay their generic AndroGel entry. After the district court dismissed the case and the 11th Circuit affirmed, the Supreme Court held that the Rule of Reason applied to reverse payment settlements. On remand, discovery is ongoing.

**Endo Pharmaceuticals, Inc. & Allergan plc: Lidoderm:** On January 23, 2017, the FTC filed a complaint against Endo Pharmaceuticals, Inc. and several generic manufacturers alleging that Endo’s agreement not to market an authorized generic Lidoderm product during the 180-day first-to-file exclusivity period is a non-cash payment to induce delayed generic entry (a ‘no-authorized generic’ or ‘no-AG’ agreement). On February 2, 2017, Endo settled the FTC charges by entering a stipulated order prohibiting it from entering similar agreements, including no-AG terms, and leaves the FTC to monitor Endo’s compliance.

**Endo Pharmaceuticals, Inc. & Impax Laboratories, Inc.: Opana ER:** On January 19, 2017, the FTC chose to file an administrative complaint through the Commission’s internal process against Impax Laboratories, Inc., claiming that Impax agreed to delay its launch of generic Opana ER in exchange for a no-AG commitment (and an agreement to pay cash to Impax if Impax did not earn its expected profits) and a meritless side deal valued at $40 million from Endo. At the time of the complaint, the FTC alleged that Impax had received over US$112 million in value. After a brief discovery period, the Administrative Law Judge conducted a 12-day trial from October 24 to November 14, 2017, and post-trial briefing will continue into January 2018.

In addition to the FTC’s litigation efforts, the Commission has released its findings based on patent settlement agreements filed with the agency in fiscal year 2015 pursuant to the Medicare Modernization Act. The November 1, 2017 report shows that while the number of final patent settlements reached a record high in 2017, the number of potential pay-for-delay agreements has dropped by more than 50% since the Actavis decision.

**WHILE THE NUMBER OF FINAL PATENT SETTLEMENTS REACHED A RECORD HIGH IN 2017, THE NUMBER OF POTENTIAL PAY-FOR-DELAY AGREEMENTS HAS DROPPED BY MORE THAN 50% SINCE THE ACTAVIS DECISION**

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settlement that includes a reasonable payment for litigation fees, only five agreements out of the 170 filed in 2015—that’s 3%—would have a potential anti-competitive effect, compared to 25 potential pay-for-delay agreements at the height in 2011 and 15 in 2013. Based on the agency’s enforcement efforts and the real risk of private class actions surviving motions to dismiss and even class certification hurdles, the report indicates that the industry has taken note and the trend is expected to continue in 2018.

PRIVATE CLASS ACTION LITIGATION: DISMISSAL, CLASS CERTIFICATION AND SUMMARY JUDGMENT

Defendants facing allegations of antitrust violations avoiding reverse payment settlements face three critical, and increasingly difficult, hurdles to absolving liability: (1) in the wake of Actavis, district courts tend to deny a defendants’ motions to dismiss; (2) some courts are certifying classes of both direct and indirect purchasers; and (3) summary judgment results are mixed, which can lead to an uncertain trial or a challenging settlement.

First, after Actavis, plaintiffs have found it easier to survive motions to dismiss. In 2017 alone, several cases have been allowed to move into full discovery. For example, in In re Loestrin 24 Fe Antitrust Litigation, the court denied Warner Chilcott plc’s motion to dismiss claims that it had compensated three generics up to US$315 million combined in various cash and non-cash value, including a no-AG commitment and various side deals, in exchange for delaying entry for five years. The court allowed the claims to move forward into discovery. In a pre-Actavis world, plaintiffs faced a high bar to survive motions to dismiss unscathed, but clearing this hurdle has since become somewhat routine.

Second, some courts in 2017 granted class certification to both direct and indirect purchasers, which changes the leverage in settlement negotiations and increases any potential damages claims. For example, two classes of direct purchasers and end-payers alleged that Medicis Pharmaceutical Corporation’s pattern of settlements provided millions of dollars in value to several generic manufacturers to delay entry for three years, during which Medicis successfully transitioned the market to new dosages of its Solodyn franchise. The District of Massachusetts granted both motions for
As momentum increases for future class certification grants, it may induce the industry to further reduce its risk by avoiding settlements that may invite challenge.

Third, defendants are facing mixed results at summary judgment, which may complicate settlement discussions and trial proceedings. Defendants in In re Lidoderm Antitrust Litig., 848 F.3d 89 (2nd Cir. 2017) (denying motion to dismiss as to claims related to Teva’s pursuit of a generic Actos product, because the brand’s false description of its patents to the FDA caused FDA’s action to delay Teva’s entry and later led to a reverse payment settlement); In re Asacol Antitrust Litig., 233 F. Supp. 3d 247 (D. Mass. Feb. 10, 2017) (allowing class plaintiffs’ reverse payments claims to survive, but dismissing claims that the brand manufacturer had executed a hard switch or a product nap to continue its monopolistic scheme).

WHAT TO EXPECT IN 2018

These insights from a 2017 retrospective indicate that the trend is likely to push forward into 2018. Specifically, we expect parties to reverse payment settlements to continue to face threats of new litigation or ongoing litigation in the coming year, particularly on pre-Actavis settlements where the alleged compensation is in non-cash value such as no-AG commitments or other arrangements. Similarly, as the federal courts have provided guidance to the pharmaceutical industry on what settlements may be made without violating the antitrust laws, we expect new litigation based on post-Actavis settlements to be much less prevalent in 2018.

DEFENDANTS ARE FACING MIXED RESULTS AT SUMMARY JUDGMENT
Under the Federal Rules of Civil Procedure, there are no geographical limitations on discovery requests.

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OVERVIEW OF INTERNATIONAL COMITY IN THE ANTITRUST DISCOVERY CONTEXT

A U.S. court could theoretically order the production of documents held anywhere in the world, so long as those documents pertain to a “nonprivileged matter that is relevant.” These broad discovery procedures create tension between the various foreign antitrust enforcement agencies and the U.S. federal courts, particularly with respect to documents submitted to foreign enforcement authorities as part of their confidential investigations. In order to incentivize parties to self-disclose information through amnesty programs and more generally to cooperate with investigations, most, if not all, enforcement authorities take the position that confidential submissions made during their antitrust investigations cannot be used for any other purpose other than the investigation itself. U.S. regulators that have received documents from their counterparts in foreign jurisdictions, as well as multinational defendants embroiled in antitrust litigation and investigations in multiple jurisdictions, have resisted requests to produce these documents in civil litigation, citing principles of international comity—the concept of judicial respect for the sovereignty of foreign nations—to argue that courts should curtail broad U.S. discovery where it would intrude on the sovereignty of other nations.

The modern trend is for U.S. courts to decline to order production in civil discovery of confidential submissions to foreign competition enforcement authorities on grounds of comity. However, a recent decision in the U.S. District Court in the Northern District of California took a different approach and ordered the production of confidential submissions made to the Korean Fair Trade Commission (KFTC) and the European Commission (EC). There are substantial reasons for distinguishing this result from several prior cases addressing discovery of these kinds of confidential submissions, but this case is a reminder that firms contemplating the submission of such materials to foreign enforcers can have no firm assurance that they will be protected from civil discovery in the United States.

QUALCOMM: INTERNATIONAL COMITY LIMITATIONS CLAIMED BY A PUBLIC AGENCY

In FTC v. Qualcomm, Qualcomm faced multiple investigations across a number of jurisdictions, including by the United States Federal Trade Commission (FTC), for alleged monopolistic behavior in the sale of semiconductor devices used in mobile phones and the licensing of related technology. Qualcomm
sought from the FTC certain documents that foreign competition enforcement authorities had shared with the FTC in connection with their related investigations of Qualcomm. These documents had been provided to the foreign enforcement agencies by various firms, including customers, competitors and licensees of Qualcomm. The FTC argued that the documents should not be produced to Qualcomm because of international comity concerns. The EC and the KFTC filed letters, siding with the FTC and objecting to the discovery based on the confidentiality interests of the third parties that had provided information in their investigations and the agencies’ continuing interests in protecting the integrity of their investigatory process by ensuring confidentiality.

The court, however, did not accept the FTC’s international comity argument and ordered the FTC to produce the documents. Sceptical that international comity applied at all, the court’s decision focused on the FTC’s physical possession of the documents in the United States. Further, the court held that even if international comity were at play, Qualcomm would still be entitled to the documents under the five-factor test. Focusing on the last factor, the court discounted the foreign enforcers’ confidentiality interests, because the enforcers’ letters did not state how disclosure would directly conflict with specific laws in their jurisdiction. Accordingly, the court concluded that Qualcomm’s need for the documents outweighed the confidentiality concerns of the foreign entities.

PREVIOUS DECISIONS DECLINING TO ORDER PRODUCTION OF FOREIGN SUBMISSIONS BASED ON INTERNATIONAL COMITY

The decision in In re Rubber Chemicals Antitrust Litigation is an example of a different approach to the comity issue. In Rubber Chemicals, the plaintiff brought private antitrust claims against a defendant chemical company whose foreign affiliate had recently been under investigation by the EC for potential antitrust violations. The plaintiff sought the production of documents that the defendant had provided to the EC as part of an effort to cooperate with the regulator’s antitrust investigation. The defendant objected, citing international comity, and the court agreed, denying the plaintiff’s motion to compel.

The court put particular emphasis on the third factor in the comity analysis, noting that the documents were “created, transmitted, and used only in Europe and in conjunction with European enforcement proceedings.” As is common in multi-jurisdictional antitrust investigations, the defendant provided its EC submission only to the EC, and there is no indication that its submission was ever provided to any agency in the United States. The court credited a letter submitted by the EC in support of the defendant’s objection, finding that it “raise[d] concerns that discovery of the EC documents could impact U.S.-EU cooperation in the enforcement of the antitrust laws.”

Taking these factors together, the court concluded that “[c]omity is a sensitive balance” but that “in this case the principles of comity outweigh the policies underlying discovery.”

CONCLUSION

International comity can be used by litigants in U.S. antitrust litigation to limit the production of documents submitted to foreign enforcement agencies. While at first glance Rubber Chemicals and other cases like it may seem directly contrary to the FTC v. Qualcomm decision, important differences in the facts and contexts of the two cases suggest that they are reconcilable and that U.S. litigants, especially amnesty or leniency applications, continue to have strong, albeit not ironclad, arguments to keep their submissions to foreign enforcers confidential. As these cases demonstrate, the context of the submission is very important: For confidential leniency or amnesty submissions to a foreign agency enforcing its own laws that were not provided to U.S. agencies or otherwise used in the United States, U.S. courts have tended to give a higher degree of deference to comity concerns and to foreign enforcers’ desire to maintain the confidentiality of their cooperators. In other contexts, however—such as FTC v. Qualcomm, where the foreign enforcer voluntarily shared the submissions with a U.S. agency that was itself a party in the U.S. case—courts may find the comity interest substantially less compelling and may be more inclined to order the submissions to be produced. Although the five-factor test described above is well-established, it is impossible to provide firm assurances as to how U.S. courts will apply the test and resolve the issue in every instance.

3. Id. at 161.
5. Id.
6. The modern trend increasingly analyzes the foreign enforcers’ confidentiality interests in their leniency programs through the five-factor Aerospatiale test. See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., Special Master’s Order Denying Motion to Compel, No. M:07-cv-01827-si, Dist. No. 286 (N.D. Cal. April 26, 2011) (holding that foreign enforcers’ confidentiality interests outweighed the plaintiffs’ interests under the Aerospatiale test).
8. Id.
9. Id. at 2.
10. Id. at 3.
11. Id.
12. Id.
13. Id.
14. Id.
16. Id.
17. Id.
18. Id. at 1083.
19. While leniency/amnesty applicants often approach multiple jurisdictions simultaneously, each submission is typically tailored to each individual enforcer and not shared with others.
20. Id. at 1084.
21. Id.
The dispute between the U.S. Department of Justice (DOJ) and Broadcast Music Inc. (BMI) currently pending before the U.S. Court of Appeals for the Second Circuit in *United States v. Broadcast Music Inc.* provides an opportunity to clarify the scope and implications of the decades-old consent decree that governs BMI’s rights to license its repertory of over 12 million musical works. At the heart of this appeal is the issue of whether and when BMI can license ‘fractional interests’ in a work, that is, interests of less than 100% of the copyright. The parties and an array of *amici* have raised sharp questions of consent decree interpretation and antitrust policy; the court is expected to rule early in 2018.

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BACKGROUND

BMI is a performing rights organization (PRO) which obtains from its songwriter and composer affiliates a non-exclusive right to license the public performance rights in their copyrighted musical works and then licenses those rights to a variety of music users. BMI is governed by a consent decree, entered in 1966 and amended in 1994, which regulates BMI’s licensing practices in certain respects. Another major PRO, the American Society of Composers, Authors, and Publishers (ASCAP), is governed by a broadly similar consent decree.

In 2014 and 2015, the DOJ undertook a review of the operation and effectiveness of the ASCAP and BMI consent decrees and solicited public comment regarding the decrees. Despite receipt of numerous comments in each round from industry participants suggesting various modifications, the DOJ ultimately decided not to support the modification of the decrees. Instead, in a surprising move, in August 2016 the DOJ issued a novel interpretation of the decrees, purportedly prohibiting ASCAP and BMI from licensing ‘fractional interests’ of less than 100% of the copyright in a musical work. The practical implication of the DOJ’s new interpretation was that rights in a great many songs—any song in which neither ASCAP nor BMI was able, individually, to license 100% of the copyright interest—could not be licensed by either. This novel interpretation threatened to force many musical works out of the licensing market altogether, harming licensors, licensees and consumers.
BMI immediately sought a declaratory judgment from the U.S. District Court for the Southern District of New York, which supervises the consent decree. In a succinct opinion issued in September 2016, Judge Louis L. Stanton sided decisively with BMI, holding that “[n]othing in the Consent Decree gives support to the Division’s views.” He observed that the plain language of the decree contains no basis for a prohibition on fractional licensing and that, as a result, “[t]he Consent Decree neither bars fractional licensing nor requires full-work licensing.”

In its reply brief and at oral argument before the Second Circuit on December 1, 2017, the DOJ made a critical concession, acknowledging that the decree does not after all prohibit the licensing of fractional interests and claiming instead that the licensing of such interests simply falls outside it. The DOJ invited the Court of Appeals to reverse Judge Stanton’s decision on the basis of this new theory. Welcoming this concession, BMI reiterated its position that no prohibition on the licensing of fractional interests can be found in the decree and invited the court to affirm accordingly.

On December 19, 2017, the Second Circuit affirmed the lower court’s decision, stating succinctly that “[t]his appeal begins and ends with the language of the consent decree” and rejecting the DOJ’s novel interpretation.
Last year’s Antitrust Annual Report described American Express’ sweeping victory over the Department of Justice (DOJ) and 17 state Attorneys General (AGs) in the Second Circuit pertaining to its use of Non-Discrimination Provisions (NDPs) in its merchant contracts—that is, contractual provisions that forbid merchants from trying to influence consumers to use lower cost forms of payment. But the Second Circuit’s decision was not the end of the dispute. The Supreme Court agreed to hear the case—only without the DOJ’s continued participation.

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THE WINDING ROAD TO THE SUPREME COURT:

UNITED STATES V. AMERICAN EXPRESS CO.
THE QUESTION FACING THE DOJ WAS WHETHER TO PETITION THE SUPREME COURT FOR CERTIORARI

The Winding Road to the Supreme Court: United States v. American Express Co.

THE WINDING ROAD TO THE SUPREME COURT

On September 26, 2016, the Second Circuit reversed the district court’s holding in favor of the DOJ and a group of AGs that American Express’ use of NDPs unreasonably restrained trade in the ‘network services market,’ because the NDPs prevented merchants from steering consumer volume to less expensive forms of payment. The Second Circuit found several errors in the district court’s decision, all of which, the circuit court said, were the result of the district court’s failure to properly account for the two-sided nature of the credit card industry and the effect of consumer reaction to merchants who would drop out of a credit card network in response to higher prices. To the Second Circuit, this failure caused the district court to make flawed findings with respect to market definition and market power, among other things.

In the wake of the Second Circuit’s reversal, the question facing the DOJ was whether to petition the Supreme Court for certiorari. The dilemma, however, was that the new presidential administration had not nominated, and the Senate had not confirmed, anyone to fill certain key leadership positions within the DOJ. While awaiting action by the President and Senate, the DOJ sought, and the Supreme Court granted, two extensions to its time to file a certiorari petition, first to May 5, 2017, then to June 2, 2017. With the leadership positions still unfilled at the latter of these deadlines, the DOJ opted not to petition the Supreme Court to review the case.

However, a group of 11 AGs did file such a petition. The AGs contended that the Supreme Court should use the American Express case as a vehicle to provide guidance to the lower courts on how to properly apply the rule of reason analysis, because “‘nowhere’ is the combination of ‘vague rules’ and ‘high stakes’ ‘more deadly than in antitrust litigation under the rule of reason.’” The AGs illustrated this point by showing that it was only after years of investigation and a seven-week trial that they found out that they had focused on the “wrong market.” Further, the AGs claimed that the Second Circuit’s decision was incorrect, because it conflicted with the Supreme Court’s market definition precedent and improperly shifted the burden to the DOJ and the AGs to affirmatively disprove the existence of pro-competitive benefits (when the burden should have been on American Express to prove the existence of those benefits).

In an unusual move, the DOJ filed a brief opposing the AGs’ certiorari petition. While agreeing with the AGs’ legal arguments, the DOJ opposed certiorari because “neither [the Supreme Court] nor any other circuit has squarely considered the application of the antitrust laws to two-sided platforms as such.” Rather than granting certiorari now, the DOJ said that the Court should “await [...] further percolation in the lower courts before taking up such novel legal issues.”

Nonetheless, over the DOJ’s and American Express’ objections, the Supreme Court granted certiorari.
Third, the circuit court’s acceptance of American Express’ ‘offset’ argument tainted its product market definition analysis. The AGs argued that the Supreme Court has endorsed a product market definition test that focuses on interchangeability. It was therefore improper, according to the AGs, for the Second Circuit to collapse credit card merchant services and credit card consumer services into a single market because those services are not interchangeable, despite the fact that the pricing of the two services are interdependent.

The DOJ filed a brief in support that largely echoed the AGs’ arguments. The DOJ added that it had demonstrated, and the district court made a factual finding, that the NDPs actually caused anti-competitive effects, which obviates the need to define the market. As a result, the DOJ said that the Court need not opine on market definition in this case. The DOJ also argued that the Second Circuit erred by requiring the DOJ to refute the existence and extent of cardholder benefits as part of its prima facie case. While the DOJ conceded that cardholder benefits, and the interdependence of the merchant and cardholder markets, are relevant, the DOJ argued that it is American Express’ burden to establish those benefits, not the DOJ’s burden to refute them at the outset.

On January 26, 2018, American Express filed its opposition brief in which it made two primary arguments for upholding the Second Circuit’s decision. First, as a matter of law and economics, a firm without market power cannot unlawfully restrain trade under the rule of reason by using vertical restraints because “curtailing supply unilaterally will simply result in a loss of market share, because other suppliers will fill the gap.” American Express contended that the AGs do not contest the Second Circuit’s holding that American Express does not have market power. Second, American Express argued that the DOJ and the AGs failed to demonstrate harm to competition. During the period in which the NDPs were in effect, “quantity and quality of output in the market for credit card services have increased sharply,” and the AGs’ only argument to the contrary is that prices American Express charged to merchants increased. American Express downplayed these price increases as evidence of anti-competitive effects because “given the… two-sided nature of the market… merchant prices in isolation do not provide an accurate proxy for output.” Instead, American Express insisted that the market can only be properly analyzed by considering the cardholder and merchant sides of the market together. American Express claimed that the AGs one-sided focus and position that the NDPs are illegal because they “restrict the competitive process” amounted to an inappropriate relaxation of their burden under the rule of reason. American Express concluded that “in the absence of market power, the antitrust laws rely on competition—not court-imposed regulation—to promote consumer welfare.”

CONCLUSION

The Supreme Court is expected to issue its decision by the end of June 2018. Regardless of which side prevails, the Supreme Court’s decision could provide guidance on how lower courts should apply the rule of reason, and it could have major impacts on how markets are analyzed in antitrust cases going forward, particularly in industries that have interrelated, but distinct, components.

SUPREME COURT BRIEFING

On December 7, 2017, the AGs submitted their opening merits brief to the Supreme Court. The AGs made three primary arguments. First, that the NDPs limit interbrand, rather than just intrabrand, competition, so a lower standard of proof should be required than in other vertical restraint cases. Moreover, regardless of whether a lower standard applies, the AGs claimed that the DOJ and the AGs sufficiently showed that the NDPs reduced competition and resulted in higher prices because merchants could not steer consumer volume to lower cost forms of payment.

Second, the AGs claimed that the circuit court erred because requiring the DOJ to show that reduced competition on the merchant side (that potentially led to higher merchant fees) was ‘offset’ by increased competition on the consumer side (in the form of benefits to consumers, such as cardholder rewards) conflicted with Supreme Court precedent. Essentially, the AGs claimed, antitrust law does not allow private companies to choose the dimensions on which they compete and that competition across all dimensions produces optimal results.

Third, the circuit court’s acceptance of American Express’ ‘offset’ argument tainted its product market definition analysis. The AGs argued that the Supreme Court has endorsed a product market definition test that focuses on interchangeability. It was therefore improper, according to the AGs, for the Second Circuit to collapse credit card merchant services and credit card consumer services into a single market because those services are not interchangeable, despite the fact that the pricing of the two services are interdependent.

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2017 REPRESENTATIVE MATTERS
ANTITRUST LITIGATION

BLUE CROSS BLUE SHIELD OF MICHIGAN
Representing in a multidistrict litigation consolidated in the Northern District of Alabama.

CAMBREX CORPORATION AND GYMA LABORATORIES OF AMERICA
Represented in appeal before the US Court of Appeals for the District of Columbia Circuit concerning antitrust claims alleging foreclosure of API supply needed to produce certain drugs. DC Circuit reversed jury verdict against appellants and remanded the case to district court.

CARGOLUX AIRLINES
Representing in both the application for annulment of the European Commission’s readopted decision in the Air Cargo Investigation and the damages litigation in the United Kingdom before the High Court.

This follows our representation of Cargolux Airlines in the successful annulment of the initial European Commission decision by the General Court in December 2015. The feat resulted in the Air Cargo Investigation winning Global Competition Review’s 2016 “Matter of the Year” and “Global Dispute of the Year: International Litigation” at The American Lawyer’s Global Legal Awards 2016.

CONFIDENTIAL CLIENT
Advised on complex antitrust issues related to an IP arbitration.

GS YUASA
Representing in lawsuits by purchasers of lithium ion batteries alleging that leading battery manufacturers participated in a multiyear price-fixing conspiracy.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to foreign exchange (FX) trading.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions related to supranational, sub-sovereign and agency (SSA) bonds.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to interest rate swaps.

MAJOR FINANCIAL INSTITUTION
Representing in a shareholder derivative suit concerning alleged conduct in the FX market.
MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions related to the silver market.

MAJOR FINANCIAL INSTITUTION
Representing in litigation regarding the challenge to network and card-issuers’ conduct with respect to setting and applying interchange fees and various payment-card network rules.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to alleged manipulation of yen Libor and euroyen TIBOR rates.

MAJOR FINANCIAL INSTITUTION
Representing in a predatory pricing matter where the U.S. Supreme Court denied plaintiff’s petition following the Sixth Circuit affirming a district court’s dismissal with prejudice of an action claiming more than US$1 billion in damages arising out of alleged collusion between Chinese solar panel manufacturers.

MAJOR DISTRIBUTED SOLAR ENERGY COMPANY
Representing in litigation regarding the monopolization of the market for the retail sale of electricity in the Phoenix, Arizona metropolitan area.

MAJOR FINANCIAL INSTITUTION
Representing in an antitrust class action relating to the Canadian Dealer Offered Rate.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to U.S. Treasury securities.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to the ISDAfix benchmark rate used for interest rate derivatives transactions.

MAJOR FINANCIAL INSTITUTION
Representing in antitrust class actions relating to the challenge to network and card-issuers’ conduct with respect to setting and applying interchange fees and various payment-card network rules.

MAJOR FINANCIAL INSTITUTION
Representing in a civil antitrust action alleging that several banks conspired to boycott an upstart platform for trading credit default swaps.

NATIONAL MUSIC PUBLISHERS ASSOCIATION
Representing as amicus in US v. BMI in the U.S. Court of Appeals for the Second Circuit.

RUBYCON
Representing the third-largest Japanese capacitor maker in a DOJ criminal investigation with parallel civil class actions and direct action lawsuits.

TWO MAJOR FINANCIAL INSTITUTIONS
Representing in antitrust class actions relating to the Canadian Dealer Offered Rate.

TWO MAJOR FINANCIAL INSTITUTIONS
Representing in antitrust class actions relating to U.S. Treasury securities.

TWO MAJOR FINANCIAL INSTITUTIONS
Representing in antitrust class actions relating to the ISDAfix benchmark rate used for interest rate derivatives transactions.
Traditionally, the European Commission’s (EC) approach towards public funding of infrastructure was that such aid fell outside the scope of State aid rules. Recent investigations show that this approach is changing, as the scope for commercial exploitation of infrastructure has increased due to increased liberalization, privatization, market integration and technological progress. The renaming of one of the EC’s units to Infrastructure and Regional aid also clearly signals that the EC is carefully re-examining the boundaries between the construction of public infrastructure that is freely accessible (and therefore not State aid) and infrastructure that is dedicated to a particular investor (which amounts to State aid).

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In the Commission 2016 Notice on the Notion of State aid (the Notice), the EC aimed to clarify the scope of EU State aid rules to facilitate public investment. The EC’s press release states that the Notice intends to clarify that:

- Public investment for the construction or upgrade of infrastructure (such as roads, railway infrastructure, inland waterways and water supply and waste water networks) is free of State aid, if it does not directly compete with other infrastructure of the same kind. In contrast, State aid rules apply to the public funding of infrastructure (such as energy, broadband, airports or ports) that is often in competition with similar infrastructure to investigate whether the subsidized project is given a selective economic advantage over its rivals.

- Even if infrastructure is built with the help of State aid, there is no aid to operators and end-users if they pay a market price. Therefore, public authorities need to ensure that such aid is not passed on to the operator or users of the infrastructure.

The EC’s Notice, however, missed an opportunity to set out a definition for ‘dedicated infrastructure.’ This distinction between what constitutes general public infrastructure and infrastructure that is dedicated to one company is still an evolving area of EU State aid law. The handful of cases in this area have arisen in the context of public funding of ports, airports and toll roads, which can be exploited directly to generate revenue. There is little decisional practice in relation to State aid that is granted for the development of greenfield industrial parks and aid to end-users of such parks. From a policy perspective, greenfield investment is critical to the future development of the EU. Such development requires public investment to make the land suitable for industrial use such as creating flood defenses, carrying out groundwork to ensure that the land is ready to build on and connecting the site to utilities such as gas and electricity.

The landmark Leipzig-Halle case on infrastructure development marked a change in the EC’s policy. Here, the EC found that public funding for the construction of a new runway, to one exclusive operator, amounted to dedicated State aid because the construction was indissociable from that operator’s subsequent competition with other exclusive operators of competing infrastructure. By contrast, this is not the case when it comes to the development of a greenfield site where the end-user does not have any exclusive rights over commercially exploitable infrastructure. In these circumstances, the end-use can be completely disassociated from the infrastructure, and there is no competition with other infrastructure of the same kind.
Therefore, carrying out infrastructure development providing general public infrastructure on a greenfield site should not be considered, by the EC, to amount to State aid.

Following this case, Germany re-notified a measure to clarify the application of State aid rules to public funding for the development and revitalization of public land by public authorities for the subsequent construction of commercial infrastructure. In the GRW Decision, the EC held that making public terrain ready to build upon and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and road) did not constitute an economic activity. Rather, this was part of the public function of the State to provide and supervise land in line with local urban and spatial development plans and, therefore, did not amount to State aid.

The notified measure was called the GRW Framework and the factual scope of this scheme set out that: “[c]ustomised development of land for ex ante identified undertakings and tailored to their needs (bespoke development) is excluded from the scheme. The same holds for land redevelopment for large retail stores.”

This was simply part of the facts, and the EC makes no legal finding on this point. The case does not find that the bespoke development of land for an ex ante identified investor amounts to State aid. In fact, the EC’s assessment of State aid in the GRW Decision makes no reference to the chronology of when an investor comes into the picture. What mattered when deciding whether there is aid granted to the purchasers of developed land was whether an advantage had been excluded through a payment (or receipt in the case of the developer) on market terms. Aid to the end-user was simply dealt with as follows:

“[a]fter the development of the land, any interested third party may buy the remedied land, which must be sold in accordance with the guidance provided in the Commission’s land sale communication, i.e. at a market price.”

This approach is also in line with the Notice which provides that there is no infrastructure aid to an end-user if it pays market price. There is no reference in the Notice or in the GRW Decision of a requirement for investors to not have been identified ex ante or any reference to the history behind the specific industrial sites chosen.
The development of infrastructure was also considered in the Propapier case, where the complainant alleged that certain infrastructure projects that had been financed using public resources, in a newly extended industrial plant, were exclusively intended for Propapier’s paper mill. The complainant argued that this amounted to dedicated infrastructure and therefore State aid for the benefit of Propapier. What was relevant in this case was not the percentage of infrastructure occupied by Propapier, but whether it received a selective benefit. The EC found the percentage of land occupied by Propapier was not necessarily an indication of dedication:

"The Commission is of the view that the fact that the TAZV plant is at present predominantly (<70)% on average and (<70)% maximum) used by Propapier does therefore not necessarily mean that it constitutes dedicated infrastructure, as its modular design makes sense from an economic point of view in times of limited public budgets."

Therefore, there is no ‘bright line’ test for dedication based on the percentage of occupation of the infrastructure that was occupied by Propapier. Once a market price has been determined, it makes no
difference what percentage of the land is occupied by the end-user. It makes no sense that where a user occupies 100% of a pre-existing industrial park, or 60% of a newly built park, that development is considered to be non-economic and costs of prior development at a loss can be met by the State, but if the user occupies 80% of a newly built park as an anchor investor, the same coverage of losses would constitute State aid to the end-user. In such a scenario, it is difficult to understand what benefit the user has received in the second case that the user in either of the first cases has not.

The policy implications of applying a percentage usage test in a greenfield development context to determine ‘dedication’ could also be detrimental. Member States would have an incentive to either develop industrial parks speculatively, potentially wasting public funds and lowering land values by creating over-supply, or to expand the size of industrial parks in order that investments involving anchor investors fell beneath the ‘dedication’ threshold. This would result in some industrial parks being over-dimensioned and would also lead to public funds being wasted. This approach of waiting for a main investor is also consistent with Propapier where the EC found that:

“[t]he fact that the regional aid for the construction of the plant was granted subject to the settlement of a main investor, in this case Propapier, in the extended business park, is considered by the Commission to constitute good public management of scarce resources since it makes sense not to start building a major public infrastructure without ensuring that it will be used, and not to over-dimension it.”

Any threshold for the level of occupation that is sufficient to constitute dedication is also bound to be arbitrary—indeed even 100% of a current footprint does not take into account any possible expansion. The concept of ‘dedicated infrastructure’ is ill-suited to development of industrial parks, especially since the focus should be whether the end-users actually receive a benefit. As long as a genuine market price is paid, an end-user of a greenfield site cannot receive any advantage.
On October 26, 2017, the European Commission (EC) announced a formal State aid investigation into a U.K. exemption from U.K. anti-tax avoidance rules for certain transactions by multinational groups, the so-called Group Financing Exemption. An adverse decision, even after the U.K. leaves the European Union (EU), could result in its removal and a retrospective charge on previously exempt profits plus interest.

Continued overleaf
The U.K. does not tax companies on the profits of their subsidiaries, whether foreign or domestic. Additionally, U.K. companies can deduct interest payments incurred on borrowing used to fund investments in domestic or foreign subsidiaries. Should a U.K. company, in determining the mix of debt and equity of its Controlled Foreign Company (CFC), overcapitalize it, U.K. funding costs could artificially replace the CFC’s funding costs, thereby diverting profits to the CFC. Should a U.K. company, in determining the mix of debt and equity of its Controlled Foreign Company (CFC), overcapitalize it, U.K. funding costs could artificially replace the CFC’s funding costs, thereby diverting profits to the CFC.

The U.K.’s CFC rules allow HM Revenue and Customs (HMRC) to reallocate to a U.K. parent profits that were artificially shifted to an offshore subsidiary, thereby subjecting them to U.K. tax. The U.K.’s CFC rules were introduced in the 1980s, and similar rules are a feature of many other tax systems. All EU Member States are expected to introduce such rules by January 1, 2019, pursuant to the EU Anti-Tax Avoidance Directive.

The Court of Justice of the European Union (CJEU) stated in a judgment that the U.K. CFC rules were contrary to the EU fundamental freedom of establishment in cases where a CFC was established in a Member State of the European Economic Area (EEA) and where it was carrying out a genuine economic activity. This led to changes to the U.K. CFC rules, including the Group Financing Exemption.

The Group Financing Exemption exempts from the U.K. CFC rules 75% of the finance income from intra-group loans between non-U.K. members of a U.K. headquartered group. The U.K. authorities justify this partial exemption on the basis that it is a reasonable proxy for the proportion of the finance that is ultimately provided from the U.K. A full exemption is available if the group is able to demonstrate that it is not funded by U.K. debt finance, but from its own local assets or new group equity capital. Without the Group Financing Exemption, the U.K. CFC rules would have reallocated the interest income to the U.K. parent company, where it would have been subject to U.K. tax.

The EC’s current view is that the Group Financing Exemption allows U.K. multinationals to avoid U.K. taxes by providing capital to a foreign subsidiary via an offshore subsidiary—which itself can be subject to little or no tax in that offshore jurisdiction. Due to the Group Financing Exemption, the offshore subsidiary’s financing income is not subject, or is only partially subject, to U.K. tax under the U.K. CFC rules.

The U.K. authorities justify the Group Financing Exemption on the basis that it would be very difficult to establish the extent to which an equity investment in a CFC has been sourced from U.K. borrowings incurred by a U.K. member of the corporate group, and that compliance costs would be overly burdensome.

If the EC decides that the Group Financing Exemption does constitute illegal State aid, then those companies that benefitted from it could be required to pay tax to HMRC that would have otherwise been due, together with interest.
**BREXIT**

While there is no fixed legal deadline, the EC aims to conclude formal State aid investigations within 18 months. The EC has concluded past State aid investigations involving tax arrangements of Member States within shorter timeframes and is likely to be able to conclude this investigation prior to the U.K.’s planned departure from the EU on March 29, 2019.

The enforcement of, and any appeals against, an adverse decision would fall within the post-Brexit State aid arrangements between the U.K. and the EU, should such arrangements—transitional or otherwise—be agreed. While both the EU and the U.K. appear in favor of a post-Brexit State aid framework, should the U.K. and EU fail to agree on one, then it is possible that an adverse EC decision would be unenforceable.

**STATE AID AND TAX**

EU Member States are free to determine the appropriate level of taxation in their jurisdictions, subject to certain exceptions, such as VAT. EU State aid rules, however, prohibit tax measures that grant selective advantages to specific businesses or sectors. In order to constitute State aid, a tax measure must, among other things, benefit certain businesses or sectors over others despite being in a comparable legal and factual situation. This selectivity test is vaguely defined and inconsistently applied, leaving the EC significant discretion to pursue various State aid cases it considers important.

There has been a concerted push at the political level in the EU to crack down on tax evasion and aggressive tax avoidance. For example, EU finance ministers agreed on a blacklist of tax havens in December 2017. The EC’s current investigation into the U.K. Group Financing Exemption can be understood in this context and is just the latest in a series of State aid tax investigations which include:

- An ongoing investigation into Luxembourg’s tax rulings in favor of GDF Suez (now Engie);
- An investigation into Luxembourg’s tax ruling in favor of McDonald’s;
- An investigation into a Luxembourg’s tax ruling in favor of Amazon, resulting in an October 2017 EC decision requiring the repayment of approximately €250 million;
- An investigation into Irish tax rulings in favor of Apple, resulting in an August 2016 EC decision requiring the repayment of €13 billion, which is currently being appealed by Ireland and Apple;
- An investigation into a Belgian tax scheme in favor of at least 35 companies, resulting in a January 2016 EC decision requiring the repayment of over €700 million, which is currently being appealed by certain affected companies;
- An investigation into Dutch tax rulings in favor of Starbucks, resulting in an October 2015 EC decision requiring the repayment of €26 million, which is currently being appealed by Starbucks; and
- An investigation into Luxembourg’s tax ruling in favor of Fiat, resulting in an October 2015 EC decision requiring the repayment of €23 million, which is currently being appealed by Luxembourg and Fiat.

Since 2013, the EC has had a dedicated task force following up on public allegations of favorable tax treatment of certain companies (in particular in the form of tax rulings). Given the political impetus to confront tax evasion and aggressive tax avoidance and given the recent leaks to the media of such potential practices, further EC State aid investigations into EU Member States’ tax arrangements can be expected.
COMMITTEE OF SUBORDINATED CREDITORS OF BANCO ESPIRITO SANTO

Representing in legal proceedings before the Court of Justice challenging the European Commission’s decision to approve Portugal’s bailout of the bank.

JAGUAR LAND ROVER

Advising on the regional aid aspects of the development of a major new manufacturing plant in the city of Nitra in western Slovakia with an initial capacity of 150,000 cars per year.

JAPAN NUCLEAR FUEL LIMITED

Representing in the EU State aid aspects of its participation in the recapitalization of French state-owned New Areva.

NUMEROUS INVESTMENT BANKS, HEDGE FUNDS AND DISTRESSED DEBT INVESTORS

Advised numerous clients in connection with State aid approvals for Eurozone bank restructuring.
A Selection of Our Pro Bono Work

ACCESS TO JUSTICE

INDIVIDUALS
United States v. Carter was a sentencing appeal in the Fourth Circuit. Our client, the appellant, agreed to a plea deal in a drug trafficking conspiracy case and waived his right to appeal in the plea agreement. But he still wished to appeal his sentence on the grounds that the judge improperly considered unconstitutional factors in issuing him a much lengthier sentence than any of the other co-conspirators. The government moved to dismiss the appeal based on the waiver the appellant signed, but the Fourth Circuit allowed the appellant to proceed with his claims relating to the constitutional issues. However, the appellant informed us that he wished to voluntarily dismiss the appeal due to negotiations with the government on other charges he is facing, and the appeal was dismissed. Rebekah Conklin assisted in this criminal litigation.

Ozlem Fidanboylu, Gabriella Griggs, Shirin Lim and Ruba Noorali have all advised low-income individuals who, were it not for the free support from pro bono lawyers and legal advice centers, would have had no access to legal help. Our volunteers work in neighborhoods near the Shearman & Sterling London office and provide advice on a range of issues including debt, small claims, family law and domestic violence.

Ozlem Fidanboylu has also worked on a pilot pro bono project with a charity that speaks for all children with life-threatening and life-limiting conditions and all who love and care for them by helping advise a client on what support should be provided by the local authority for their child.

AMICUS
Amicus is a small charity that helps provide representation for those facing the death penalty in the United States. Amicus believes that the death penalty is disproportionately imposed on the most vulnerable in society, violating their right to due process and equal justice before the law.

Teams of lawyers including Lynn Diamond and Stephanie Greco are currently reviewing court documents from a Nebraska post-conviction case with all initial state and federal appeals exhausted. Amicus has been given funding essentially to look into whether the client has intellectual and developmental disabilities (IDD), but there are other non-IDD-related mitigation themes that have never been explored as well as a non-triggerman claim, all of which could be important in terms of clemency. Furthermore, the client has proclaimed innocence from the beginning and was convicted largely on the testimony of his co-defendant, who later recanted and stated that he gave perjured testimony regarding our client being the triggerman. There are a number of conflicting witness accounts, as well as accounts from the same witnesses, that conflict with their own previous accounts. Amicus would like to have this information organized so that we are able to determine whether an innocence claim viable enough to warrant further investigation exists, as well as be ready for clemency review should the client not prevail on an IDD claim.

A team of lawyers, including Timothy Haney, Shirin Lim, Caroline Préel and others, are conducting a statistical analysis of sentencing methods used in capital cases in the state of Missouri. The project will help address whether Missouri’s capital-sentencing statute has operated free of constitutionally impermissible influences, such as race and indigency, in determining whom the state sentences to death and executes.

HER JUSTICE
For 25 years, Her Justice has been providing free legal help to women living in poverty in New York City. Volunteer lawyers may choose to take on a divorce case involving financial or child-related issues in Supreme Court, or an order of protection, custody/visitation or child or spousal support matter in Family Court, or to represent immigrant victims of gender-based violence to help them obtain legal status—all of which can make a lasting impact on the lives of women living in poverty. Jessica Delbaum, who has been mentoring teams on these types of projects for many years, is the overseeing partner on many Her Justice projects, leading teams of lawyers dedicated to helping low-income women achieve both contested and uncontested divorces.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT
The International Refugee Assistance Project (IRAP) organizes lawyers to assist refugees and displaced persons. We have helped them on a number of cases this year including the following.

Shirin Lim is continuing to represent an Afghan national who served as a translator for the U.S. government in Afghanistan. As a result of his service to the U.S., he and his family have received threats to their safety and have had to flee their village. The team helped close down some gaps and supplement his
Chief of Mission approval, which was sadly refused. They have since helped gather further evidence necessary in order to submit his appeal.

Savas Manoussakis is one of a team providing representation to a gay Iraqi man who has had to flee to Turkey due to concerns for his safety. The legal team, with the help of IRAP, will refer the case to the United Nations High Commissioner for Refugees and argue that the client meets the definition of a refugee and merits a resettlement referral to a safe third country.

LATINOJUSTICE
Shearman & Sterling is co-counsel with LatinoJustice in a federal class action litigation in the Eastern District of New York, challenging the constitutionality of the behavior of the Suffolk County Police Department, certain individual officers and administrators and Suffolk County. The lawsuit was filed in April 2015 on behalf of 21 Latinos and other unidentified class members who, for over a decade, have been subjected to unfounded race-based traffic stops, unconstitutional searches and seizures, issued unjustified traffic citations and harassed and robbed by various police officers. In October 2015, the court granted a motion to remain anonymous, holding that plaintiffs reasonably feared retaliation if their identities were to become public and that their interest in remaining anonymous outweighed the public interest in making their identities known. Discovery has been ongoing since 2017. Associate James Alicea has devoted approximately 450 hours to this project since inception.

THE LEGAL AID SOCIETY OF NEW YORK
The Legal Aid Society’s Access-to-Benefits Hotline Project is a ‘one-stop’ resource for New Yorkers in need of legal assistance to obtain government benefits. Volunteers work with experienced Legal Aid Society staff to answer the hotline, identify questions and legal issues, record basic information about each caller’s issue and provide advice when appropriate. Legal matters related to employment/unemployment insurance, public health insurance (including Medicaid), public assistance (including food stamps) and education law/special education are all addressed. Jessica Delbaum and Caroline Huang as well as other lawyers outside of Antitrust regularly volunteer to cover the hotline. In 2017, Jessica Delbaum received an award from Legal Aid for her dedication and contributions to the Access-to-Benefits Hotline Project.

Beginning in early February 2017, Shearman & Sterling and six other New York firms began working on the Legal Aid Society’s ‘At-Your-Desk’ Immigration Hotline Project in response to the Immigration and Customs Enforcement (ICE) raids. Due to the overall success of the project, it has been extended multiple times and will run through 2018 provided the need remains. The hotline coverage is from 8:00 AM (EST) to 8:00 PM (EST), and volunteers from around the globe signup to cover three or more hour shifts. Calls are routed from Legal Aid to a main number at Shearman & Sterling and then directed to a unique number that will be installed on all volunteers’ office phones. Once a call is received, the volunteers will provide ‘Know Your Rights’ information and in the event a family member is detained in a raid, the volunteers are trained to collect specific information and given other details. Legal Aid has even arranged for a translation service to be used if the person on the line does not speak English. Lynn Diamond, Aleksandra Petkovic, William Haun, Alisa Mastro, Stacy Ruegilin and Elizabeth Vitt along with lawyers from other practice areas and offices have all volunteered for this project.

NATIONAL VETERANS LEGAL SERVICES PROGRAM
The National Veterans Legal Services Program (NVLSP) is a nonprofit organization that has worked since 1980 to ensure that the government delivers to the 25 million U.S. veterans and active duty personnel the benefits to which they are entitled because of disabilities resulting from their military service. Matthew Modell leads a small team including Caroline Tunca that is working on a reconsideration brief to submit to the Board of Correction of Naval Records for his client Mr. Samilpa. The client was improperly discharged for a personality disorder when he should have been discharged for post-traumatic stress disorder, thereby depriving him of some of the health benefits he is owed. The United States Government Accountability Office (GAO) reports and the Department of Defense (DOD) have acknowledged that service members in the 2000s were sometimes improperly discharged.
A Selection of Our Pro Bono Work (cont’d)

VOLUNTEER LAWYERS FOR THE ARTS

Volunteer Lawyers for the Arts (VLA) is the leading legal aid and education organization dedicated to New York artists and its arts and cultural organizations. VLA strives to protect the artistic community’s livelihoods, businesses and creative works through access to dedicated legal representation and focused education programs and helps facilitate pro bono legal representation for low-income artists. For over 10 years, Shearman & Sterling has been hosting the VLA On-site Legal Clinic. VLA staff recruit their artist members who are seeking advice on arts-related legal issues in a private appointment with volunteer lawyers. During the private appointment, our volunteer lawyer(s) respond to inquiries about arts-related legal matters. In the past, artists presented issues in the following areas: exploring alternatives for starting for-profit and not-for-profit business entities; seeking assistance in understanding the basic terms of a contract or ascertaining whether intellectual property rights are being infringed. Teams of firm lawyers are created to meet with each artist, and antitrust associate Aleksandra Petkovic is a frequent volunteer at the many clinics held at our New York office each year.

In the fall of 2017, VLA provided first-year lawyers in the United States with research projects on a variety of art law issues. Daniel Francis was one of the senior lawyers who reviewed a memorandum to ensure it was clear and concise, addressed the legal issue being researched and provided constructive feedback to the junior lawyer.

ASSISTANCE TO STATES AND GOVERNMENTS

LAWYERS WITHOUT BORDERS

Shearman & Sterling has been collaborating with Lawyers Without Borders (LWOB) for over 10 years on a variety of global rule of law projects for developing nations and regions emerging from conflicts.

In 2017, we agreed to assist LWOB in three components of work in Tanzania. We developed a training module on Advanced Crime Scene Investigation to be used by Tanzanian Wildlife Officers as part of the Wildlife Crimes Training, developed a graphic novel focusing on techniques for interrogating individuals suspected of committing wildlife crimes, using confessions in court and other investigative techniques, and will provide on-the-ground training in Tanzania in 2018. The training will focus on enhancing technical knowledge of crime scene investigation and management, including how to properly secure a crime scene and material evidence, techniques for conducting witness interviews and testifying in court.

Ryan Shores and William Haun drafted a memorandum evaluating comparative state practice in ensuring access to defense counsel in criminal proceedings across several regional states, with three in-depth case studies, including relevant ‘peer states’ for Tanzania such as Malawi, Kenya, South Africa, Uganda, Ethiopia and Zambia.

Stacy Ruegilin and Timothy Slattery along with a broader team completed a comparative state practice memorandum on the approaches to the domestic prosecution of foreign militants. Following a conflict, a country faces the task of prosecuting the individuals responsible for crimes committed by members of insurgent and other groups. Some of those militants may be foreign nationals who, having participated in the insurgency and committed gross human rights violations, have broken Iraqi law. As much as there is a need to ensure that Iraqi members of ISIS are held accountable for their actions, processes should exist which ensure that foreign militants face a similar fate.

Caroline Tunca and Mark Weiss were part of a team who researched and drafted a legal memorandum providing analysis on protections for women, youth and persons with disabilities under international law that apply to Yemen. The country has been embroiled in a civil war for about three years, and all parties to the conflict continue to commit human rights violations with impunity throughout Yemen. Women, youth and persons with disabilities are among the most vulnerable populations in the state, and even before the conflict, these populations were politically marginalized and isolated from formal decision-making processes at the local and national levels.
ANTITRUST AND COMPLETION-FOCUSED PROJECTS

ELIMINATING CHILD LABOUR IN TOBACCO GROWING

Eliminating Child Labour in Tobacco Growing Foundation (or ECLT Foundation) is a non-profit foundation and a global leader in preventing child labor in tobacco agriculture and protecting and improving the lives of children in tobacco-growing areas.

The ECLT Foundation funds programs in tobacco-growing communities worldwide to help them end child labor by addressing the root causes. These programs raise awareness so communities can come together to protect children, improve standards for children’s safety and health, build schools, provide vocational training, create infrastructure and deliver technology.

George Milton has been assisting the ECLT Foundation by attending board meetings to advise members on EU competition/antitrust law to ensure they are fully compliant.

EUROGROUP FOR ANIMALS

Geert Goeteyn, Caroline Préel and Alexander Witt have been using their antitrust skills in the pro bono context by advising Eurogroup for Animals, a pan-European umbrella organization for animal welfare, by researching the competence of the EU to take action to promote animal welfare in the context of international trade negotiations.

RESEARCH PROJECTS

INTERNATIONAL RESEARCH PROJECT TO HELP END FGM/C

A Brussels and London team including Elvira Aliende Rodriguez, Gaetano Lapenta, Patricia Sanchez-Calero Barco and Ozlem Fidanboylu have conducted research on legal frameworks governing female genital mutilation/cutting (FGM/C) in those African countries in which FGM is still prevalent for an international non-profit working to end FGM/C.

In collaboration with other firms, the aim is to create a report that sets out the legal framework and status of FGM/C, highlight examples of good and bad practice, the lessons to be learned from these, and recommendations for sound legal frameworks that will contribute to the global elimination of FGM/C.

INTERNATIONAL SERVICE FOR HUMAN RIGHTS

The International Service for Human Rights (ISHR) is an independent, non-governmental organization dedicated to promoting and protecting human rights. They achieve this by supporting human rights defenders, strengthening human rights systems and leading and participating in coalitions for human rights change. Patricia Sanchez-Calero Barco has been working with the ISHR and has compared laws and drafts laws of Colombia and Honduras with a Model Law for the protection of human rights defenders.

PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS

The Platform for International Cooperation on Undocumented Migrants (PICUM) is an international nongovernmental organization that represents a network of 155 organizations working with undocumented migrants in 30 countries, primarily in Europe but also in other areas. PICUM promotes recognition and realization of the human rights of undocumented migrants, providing a link between local realities and the debates at the policy level.

PICUM gathers case law concerning the rights of undocumented migrants from a range of sources, including United Nations Treaty bodies, judgments of the European Court of Human Rights, the Court of Justice of the European Union, decisions of the European Committee of Social Rights and jurisprudence from national courts and tribunals. Caroline Préel, Patricia Sanchez-Calero Barco, Savas Manoussakis, Ruba Noorali and George Milton have each conducted case reviews for PICUM in order to help support PICUM and its network of members and partners in their advocacy.
I became a lawyer because I was—and remain—convinced that lawyers have a special responsibility in preserving self-government. To excel at applying legal principles, crafted over a long period of time and in light of both logic and experience, our professional training requires that we have a unique appreciation for human nature, the social and physical sciences, philosophy, and the source of our rights. In choosing pro bono matters, I try to focus on cases that will deepen my understanding of those background pillars of the rule of law, and apply them to the defense of the civil society that can preserve self-government. As such, I am especially interested in cases preserving and defending the free exercise of religion and the freedom of speech. In my view, it is no accident that these Bill of Rights guarantees were enumerated in the First Amendment to the U.S. Constitution, and the government can make “no law” against them—these rights are particularly critical to preserving the premises of self-government.

My interest in First Amendment pro bono cases began in law school, where I served as a research and teaching assistant to a law professor who actively litigates, writes, and teaches on free speech and free exercise issues. During that experience, I witnessed first-hand how peaceful, everyday Americans who sought to live out their convictions were condescended to and marginalized by the very government charged with securing their rights. Experiencing how the government often conflates itself with—and seeks to supplant—genuine community was formative, and at the heart of cases I worked on involving individuals who counseled others on
sidewalks, a family that was forced to choose between their consciences and their livelihoods, and non-profits that provide comfort and counsel to women in crisis situations. I will not forget the vindication and heart-warming satisfaction I felt after a case I worked on involving the owners of a family pharmacy in Illinois finally prevailed after years of litigation where the state of Illinois—and no less than the Illinois Governor—sought to shut their business down because their moral views did not correspond with the state’s. That experience reinforced in me the genuine diversity our legal system is capable of preserving when it has a firm grasp of the principles that underlie self-government.

Since law school, my involvement in First Amendment pro bono cases has blossomed in the form of amicus curiae briefs on salient free speech and free exercise issues. A few experiences especially stand out: in my first-ever filing with the Supreme Court of the United States, I served as the principal draftsman of an amicus brief filed on behalf of current and former elected officials, business leaders, and public policy advocates supporting former Virginia Governor Bob McDonnell’s successful effort to overturn a criminal conviction that subjected innocuous constituent interactions with their elected officials to the federal bribery laws. Getting to know Governor McDonnell during that process was wonderful, and it made watching the Supreme Court unanimously reverse his conviction even more satisfying. In another Supreme Court amicus matter, I had the honor of writing a brief on behalf of prominent constitutional law scholars—including Richard Epstein, Robert George, and Rick Garnett—to support the Little Sisters of the Poor in their effort to secure a religious-based exemption in light of the Affordable Care Act. The Little Sisters of the Poor have come to my church for years to seek support for their ministry caring for those with no one else to care for them, those who might otherwise die alone, and the elderly. On the same day I was sworn into the Supreme Court bar (with the Little Sisters’ lead counsel serving as my movant), I got to watch Chief Justice Roberts explain from the bench what the Little Sisters had explained all along: an accommodation for them existed that would not undermine the Act’s general policy. It was surreal. And now, I have the great honor of representing both the Becket Fund for Religious Liberty and United States Senator Jeff Flake in an amicus curiae effort before the U.S. Court of Appeals for the D.C. Circuit. We are supporting the Archdiocese of Washington, as the D.C. Metro System has refused to allow the Archdiocese to put up advertisements for Christmas simply because the advertisements are religious in character.

Given my pro bono interests and experiences, I also try to spend my free time writing and working on related projects that preserve a free society. In addition to writing on First Amendment issues for a variety of publications, I also serve as a member of the Board of Directors for Boys Town, Washington, D.C. Founded over a century ago by Father Edward Flanagan, Boys Town has helped prepare boys and girls from broken homes for the responsibilities of citizenship by focusing on society’s foundations: providing them a loving home with a mom and a dad. To that end, I also try to ‘practice’ at home what I ‘practice’ in pro bono; I currently have two young girls, and my wife and I do our very best to serve them by teaching them in the principles of self-government.

The law itself is just a tool – how it is oriented, and whether it preserves self-government or sanctions its erosion, is up to we lawyers in the first instance (it’s no coincidence that, in Shakespeare’s Henry VI, killing all the lawyers is “the first thing” people who want to undermine justice suggest doing). I am grateful to have had a legal education that focused on the law’s first principles in a self-governing society, not just its technicalities; that training opened the door to a wide array of pro bono opportunities that I’ll never forget and did not previously think possible.
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Thought Leadership

ACADEMIC ROLES

**GEORGETOWN UNIVERSITY LAW CENTER**
Wayne Dale Collins | Adjunct Professor of Law | Antitrust

**LEIDEN UNIVERSITY**
Geert Goeteyn | Guest Lecturer | EU Competition Law and its Application in the Aviation Industry

**NEW YORK UNIVERSITY**
Wayne Dale Collins | Adjunct Professor of Law | Antitrust

**OXFORD UNIVERSITY**
Matthew Readings | Guest Lecturer | Competition law (Undergraduate level)

**COLLEGE OF EUROPE**
Elvira Aliende Rodriguez | Summer School Competition Law

**HARVARD LAW SCHOOL**
Daniel Francis | Climenko Fellow and Lecturer

AWARDS AND RECOGNITIONS

**GLOBAL COMPETITION LAW REVIEW**
Shearman & Sterling was recognized as one of the ‘Global Elite’ firms

**WHO’S WHO LEGAL**
Jessica Delbaum, James Webber and Elvira Aliende Rodriguez are featured in Who’s Who Legal’s first-ever listing of the Upcoming Stars of the global competition community: Competition—Future Leaders 2017 list

BLOGS

**ANTITRUSTUNPACKED.COM**
A blog providing concise but operationally meaningful content to in-house counsel and senior management on important antitrust and competition law topics

**CARTELDIGEST.COM**
A repository of key data on global cartels with significant enforcement activity in the past 30 years

PUBLICATIONS

**ANTITRUST ADVISORS**
Chapter on Mergers and Acquisitions | Jessica Delbaum (co-authored)

**CONCURRENCES**
*Algorithms and artificial intelligence and the risk of collusion* | Geert Goeteyn | November 2017

**THE M&A LAWYER / CONCURRENCES**
*The FTC’s Challenge of Red Ventures—Bankrate: Antitrust Risks in Deals Backed by Private Equity Minority Shareholders* | Jessica Delbaum, David Higbee, Djordje Petkoski, Dale Collins, Arjun Chandran | November 2017

**THE IN-HOUSE LAWYER**
*How changes in internet consumption habits shape EU policies* | Paolisa Nebbia | October 2017

**GLOBAL COMPETITION REVIEW**
*Know-how IP & Antitrust* | Chapter on United States | Jessica Delbaum, David Higbee, Timothy Haney | October 2017

**JECLAP**
*Case AT.40023 Cross-border access to pay-TV: Paramount’s Commitments: The Bigger Picture* | Gabriella Griggs (co-authored) | November 2017

**ICLG**
International Comparative Legal Guide to: Cartels & Leniency 2018 | The legal parameters of the Commission’s investigative powers and the imposition of parental liability in cartel cases | Elvira Aliende Rodriguez, Geert Goeteyn | November 2017

**ICLG**
International Comparative Legal Guide to: Cartels & Leniency 2018 | Chapters on EU, Germany, Italy and UK | Elvira Aliende Rodriguez, Geert Goeteyn, Shirin Lim, Paolisa Nebbia, Matthew Readings and Mathias Stocker | November 2017

**CONCURRENCES**
*The English High Court Rules in Favour of Air Cargo Defendants Regarding Temporal Scope of Claimants’ Claims* | Elvira Aliende Rodriguez, Susanna Charlwood, Geert Goeteyn, Jo Rickard, Ruba Noorali | October 2017

**JECLAP**
*Case AT.40023 Cross-border access to pay-TV: Paramount’s Commitments: The Bigger Picture* | Gabriella Griggs (co-authored) | November 2017

**ICLG**
International Comparative Legal Guide to: Cartels & Leniency 2018 | The legal parameters of the Commission’s investigative powers and the imposition of parental liability in cartel cases | Elvira Aliende Rodriguez, Geert Goeteyn | November 2017
THE IN-HOUSE LAWYER
Legal Briefing | ‘Access to content anytime, anywhere, any device: How changes in consumption habits shape EU policies’ | Paolisa Nebbia | September 2017

THE IN-HOUSE LAWYER
SUMMER EDITION
‘The future of entertainment: The impact of the entry OTT players on media regulation and antitrust enforcement’ | Paolisa Nebbia | September 2017

TRANSACTION ADVISORS AND CONCURRENCES
‘EU Court decides EU merger control can only catch joint control transactions if the resulting entity is “Full-Function”’ | James Webber, George Milton | September 2017

GETTING THE DEAL THROUGH
Air Transport 2018 | Chapter on European Union | Geert Goeteyn | September 2017

LEXOLOGY
Cartels in Italy | Paolisa Nebbia | September 2017

LEXOLOGY
Merger Control in Italy | Paolisa Nebbia | August 2017

GLOBAL COMPETITION REVIEW
The Antitrust Review of the Americas 2018 | Chapter on US Cartels | John Cove, Jessica Delbaum, David Higbee, Djordje Petkasik, Aleksandra Petkovic | August 2017

GLOBAL COMPETITION REVIEW
The EMEA Antitrust Review 2018 | Chapter on EU Cartels and Leniency | Elvira Aliende Rodriguez, Ruba Noorali | August 2017

THOMSON REUTERES TAXNET
‘Italy aims to change merger notification thresholds’ | Paolisa Nebbia | August 2017

CONCURRENCES
e-Competitions | ‘Italy’s big data probe: The Italian Competition Authority opens a market investigation on Big Data’ | July 2017

GETTING THE DEAL THROUGH
Private Antitrust Litigation 2018 European Union | ‘The publication of the Study on the Passing-On of Overcharges and other developments’ | Geert Goeteyn | June 2017

GETTING THE DEAL THROUGH
Market Intelligence Cartels 2018 | ‘Damages actions in the EU and US’ | Elvira Aliende Rodriguez, John Cove, Geert Goeteyn

CONCURRENCES
‘Big data and competition law’ | Geert Goeteyn (co-authored) | June 2017

OXFORD UNIVERSITY PRESS
EU Regulation and Competition Law in the Transport Sector, 2nd Edition
• Chapter 4 ‘Passengers’ rights in the European Union’ | Elvira Aliende Rodriguez
• Chapter 8 ‘Road Transport: Competition’ | Elvira Aliende Rodriguez (co-authored)
• Chapter 11 ‘Inland Waterways’ | Elvira Aliende Rodriguez (co-authored)
• Chapter 12 ‘Liberalization and Regulation’ | Elvira Aliende Rodriguez (co-authored)

TRANSACTION ADVISORS
Is the Commission Starting to Take a Tough Stance on the Enforcement of Merger Procedure? | Elvira Aliende Rodriguez, Geert Goeteyn, Matthew Readings, James Webber, George Milton, Paolisa Nebbia, Mathias Stöcker | May 2017

EUROPEAN JOURNAL OF LEGAL STUDIES
‘Vers un marché unique numérique: Géoblocage et portabilité transfrontière des services de contenu en ligne dans l’UE’ | Gaetano Lapenta | March 2017

TRANSACTION ADVISORS
‘Brexit’s implication for merger control’ | Geert Goeteyn | January 2017
SPEAKING ENGAGEMENTS

DENEA
Congreso DENAE Mercado Único Digital | Paolisa Nebbia | ‘Licensing of Audiovisual Content in the Digital Single Market’

AMERICAN BAR ASSOCIATION
Webinar panel on ‘Inability to Pay’ | Djordje Petkoski | 7 December 2017

GLOBAL COMPETITION REVIEW
GCR Live London | Panel ‘From now until 2019: Advice for the short term’ | James Webber | 30 November 2017

WORLD INTELLECTUAL PROPERTY ORGANISATION AND INTERNATIONAL LABOUR ORGANISATION
WIPO Masters of Law in IP Law | ‘The interface between IP and antitrust law’ | Paolisa Nebbia | 27-29 November 2017

IBC LEGAL (KNECT365)
Advanced EU Competition Law Brussels | 21-22 November 2017

- ‘Competition law in the digital environment’ | Paolisa Nebbia
- ‘Cartel settlements and appeals’ | Elvira Aliende Rodriguez

CITY & FINANCIAL CONFERENCES
The Post-Brexit UK Trade Policy Summit | Panel moderator ‘Trade in goods, manufacturing, food and agribusiness’ | James Webber | 8 November 2017

AMERICAN BAR ASSOCIATION (ABA)
Panel ‘Where are the antitrust agencies going under new leadership’ | David Higbee | 2 November 2017

KLUWER LAW
South Korea: 6th Annual International Arbitration, Compliance & Competition Law Summit | 24 October 2017

- ‘The application of antitrust rules to the new economy/platform economy’ | Paolisa Nebbia
- ‘Recent developments in EU merger control and antitrust enforcement: The EU Commission’s increasing reach’ | Geert Goeteyn

IBC LEGAL (KNECT365)
Competition Law and Regulation in the Telecoms, Media & Technology Sector | ‘Content rights and geoblocking’ | Paolisa Nebbia | 17-18 November 2017

THE GENTLEWOMEN’S CLUB
Moderator ‘Lunchtime conversation with Ursula Burns’ | Özlem Fidanboylu | 11 October 2017

AMERICAN BAR ASSOCIATION
Antitrust Merger Workshop | Role playing ‘The front office of a US agency reviewing the staff recommendation to challenge a merger and meeting with the merging parties’ | David Higbee | 28 September 2017

INTERNATIONAL FINANCIAL LAW REVIEW (IFLR)
European M&A Forum | ‘Merger control: Steering a safe course’ | James Webber | 27 September 2017

GLOBAL COMPETITION REVIEW
GCR Live 2nd Annual State Aid | Panel ‘Monitoring, enforcement – and recovery’ | James Webber | 26 September 2017

CONCURRENCES

KLUWER LAW

GLOBAL COMPETITION REVIEW
GCR Live 9th Annual Brussels Conference: The bigger picture | 4-5 July 2017

- Panel ‘Antitrust across the Atlantic for the next four years – how will it play out?’ | Jessica Delbaum
- Panel ‘What’s in the toolbox now? What are the latest investigations techniques used by the agencies?’ | Elvira Aliende Rodriguez

FORUMEUROPE.TV
14th European Digital Forum | ‘Internet e le nuove forme di consumo dei contenuti audiovisivi: Critica concorrenziale’ | Paolisa Nebbia | 15-16 June 2017

IBC LEGAL (KNECT365)
Advanced EU Competition Law London | ‘The EC merger control review’ | Geert Goeteyn | 16-17 May 2017

KNECT365 LIFE SCIENCES
EU Pharmaceutical Law Forum | Panel ‘Recent EU merger control cases in the pharmaceutical industry’ | Elvira Aliende Rodriguez | 16-18 May 2017
TRANSACTION ADVISORS
San Francisco M&A Conference | Panel ‘Navigating regulatory and antitrust issues in M&A’ | Jessica Delbaum

NOMIKI BIBIOTHIKI
Recent Developments in Fighting Cartels | ‘Leniency policy & settlement procedure’ | Elvira Aliende Rodriguez | 11 May 2017

KLWER LAW
5th Annual Global Competition Law Forum | ‘Section 2 – Cartels update’ and Panel ‘Ask the experts – Antitrust update for 2017 – Regional answers for doing business outside HK if you are a HK company – Korea, Japan, China, EU, HK’ | Elvira Aliende Rodriguez | 26 April 2017

IBC LEGAL (KNECT365)
EU Merger Control Conference | ‘Multi-jurisdictional filings and challenges’ | Geert Goeteyn | 4 April 2017

CONCURRENCES AND SHEARMAN & STERLING
Workshop moderator ‘Big data and competition’ | Geert Goeteyn | 23 March 2017

GLOBAL COMPETITION REVIEW

INSTITUTO DE ESTUDIOS BURSÁTILES (IEB)
‘EU competition rules in the transport sector’ | Elvira Aliende Rodriguez | 27 February 2017

COMMERCIAL DISPUTE RESOLUTION (CDR)
CDR Spring Competition Litigation Symposium | Panel ‘Beyond the follow-on claim’ | Elvira Aliende Rodriguez | 23 February 2017

DUKE UNIVERSITY
Panel ‘Corporate law at an international law firm: Developing a global practice’ | Arjun Chandran | 8 February 2017

IBC LEGAL (KNECT365)
Competition Law in the Aviation / Maritime Sector | ‘Access to facilities: Ill defended but important’ and panel ‘Comparing current challenges in aviation and shipping’ | Geert Goeteyn | 31 January–1 February 2017

NEW YORK STATE BAR ASSOCIATION
Antitrust Law Section Annual Meeting | ‘EU/US antitrust enforcement gap?’ | Jessica Delbaum | 26 January 2017

INTERNATIONAL FINANCIAL LAW REVIEW (IFLR)
European In-House Counsel Summit | 26 January 2017

• Conference Chair | James Webber

• Panel ‘The Competition Landscape Post-Brexit’ | George Milton
Client List

Abu Dhabi National Oil Company (ADNOC)
Acacia Mining
Ad hoc Committee of LT2 Creditors of Banco Espirito Santo
Aegion
Airline People Directors’ Council
Albacore Capital
Albemarle
Allianz
Alpha Bank
American Axle & Manufacturing
American Sugar Refining
Amyris
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Hong Kong International Construction Investment Management
Hoya
iClick Interactive Asia
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Intercontinental Exchange (ICE)
International Chemical Investors Group
International Finance Corporation (IFC)
Jaguar Land Rover
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NKT Cables Group
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Olajay Group
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Paramount Pictures
Passport Capital
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Sociedad de Inversiones Pampa Calichera
Societe Generale
SolarCity
Sampo Japan Nipponkoa Insurance
Sony
Sprint Communications
S&P Global (formerly McGraw-Hill Financial)
State Grid International Development Limited
Statoil
STMicroelectronics
Strategic Value Partners
Summitview Capital & EHE Fund
Sun Pharmaceutical Industries
Tata Steel Europe
Tate & Lyle Sugars
Temasek Holdings
Tetra Laval International
Textron
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The Chef’s Warehouse
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Chambers, 2017

INTERVIEWEES HIGHLIGHT THE FIRM’S SECTOR-SPECIFIC EXPERTISE AND ONE CLIENT OBSERVES: “I APPRECIATE THE COMBINATION OF THEORETICAL KNOWLEDGE AND A PRACTICAL APPROACH,” VALUING THAT “THEY ARE NOT AFRAID TO GIVE CLEAR ADVICE.”

Chambers, 2017

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Legal 500, 2017