

Focus On
**Antitrust and
Competition**



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Merger Control: Gun Jumping Goes Global p.12 >>

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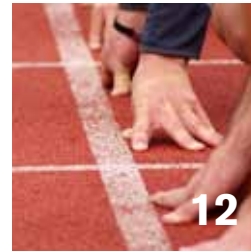
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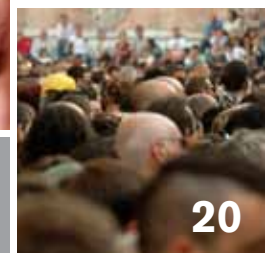
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In This Issue

Welcome to the second issue of *International News* for 2010.

The focus for this issue is antitrust and competition, an area of law that is always at the cutting edge of international developments.

We start by examining the expansion of enforcement measures taken against “gun jumping” in the European Union. Gun jumping refers to unlawful premerger coordination between the parties to an M&A transaction. While gun jumping concerns have a long history in the United States under the Hart-Scott-Rodino Act and Section 1 of the Sherman Act, the European Commission and EU Member State authorities are now also pursuing merging companies under similar theories.

Staying with the theme of international prosecution, we take a look at the upsurge in anti-cartel enforcement activity around the world. This increased global enforcement, often coordinated across several jurisdictions, has important ramifications for companies operating internationally and for their employees, who may be at risk of criminal prosecution.

We move then to China for an examination of the lessons learned since the introduction of China’s Anti-Monopoly Law two years ago. The main lesson is that Chinese authorities have a decidedly activist enforcement agenda, an extremely important consideration for companies doing business in China. In line with this theme of taking stock, we move to the United States and review the state of antitrust enforcement under the Obama administration. After just one year in office, both of the US enforcement agencies appear to be committed to making good on President Obama’s campaign promise of more rigorous antitrust enforcement.

In the European Union, class action legislation continues to feature prominently on the competition law landscape. We examine developments in Italy and Germany as these countries are at the cutting edge of the class action debate. These developments demonstrate that, despite the delay in promulgating EU-wide legislation, the appetite for European class action antitrust litigation remains sharp, creating new and changing risks of which companies must be aware.

Finally, we look at the dangers of sharing commercially sensitive information. In the European Union, sharing such information could be regarded as a means to influence the conduct of competitors on the market. Companies that share data with their competitors routinely must, therefore, be aware of the legal risks associated with such exchanges which can include fines of up to 10 per cent of a company’s worldwide annual turnover.

In our features section, we return to China for an overview of the new Health and Pharmaceuticals Regulations which were initiated as a result of a recent rabies vaccine scare.

We turn then to taxation. First, we take a look at the new guidance concerning the exit tax applicable in the United States to expatriates and former long-term green card holders, published late in 2009. Second, we take the opportunity of the arrival of the new UK coalition Government to take stock of the tax environment for inward investors into the United Kingdom. We also note the significant points of the new Budget.

Finally, we review the UK Bribery Act 2010 and compare it with the Foreign Corrupt Practices Act (FCPA). Any multinational company with operations in the United Kingdom or United States should examine closely its compliance policies and procedures in an effort to avoid being one of the Bribery Act’s earliest examples or the FCPA’s next catch.

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New Chinese Health and Pharmaceuticals Regulations

By Henry (Litong) Chen and Nikki Xi

Regulation by the Chinese Government of the health and pharmaceuticals industry generally follows a cyclical pattern: a major incident occurs that impacts the Chinese public and triggers government investigations, resulting in changes to the regulation or regulatory system to close the loopholes found in the old legal regime that allowed the incident to happen in the first place. Alongside this cycle is a predictable system of blaming directly or indirectly one or more officials.

The Regulatory Cycle in Action

On 10 July 2007, Mr Zheng Xiaoyu, the former Chief of China's State Food and Drug Administration (SFDA) was executed on two counts: the taking of bribes and dereliction of duty. The catalyst for his execution was the scores of accidental deaths resulting from counterfeit and substandard drugs.

Although the SFDA under the leadership of Mr Zheng was carrying out the system of Good Manufacturing Practice (GMP for drugs, the system had several loopholes. First, pharmaceutical companies were

able to obtain GMP licences even though they had not attained GMP standards. Second, the GMP licensing system was not being carried out in a careful, systematic and standardised way; some licence standards for manufacturing pharmaceuticals had even been lowered instead of raised. Third, the GMP label had become window dressing: once a licence was obtained, a pharmaceutical company was regarded as permanently safe as the system failed to supervise or monitor the company on an ongoing basis. Combined together these factors meant the SFDA was unable to achieve its goal of preventing the production of counterfeit and substandard drugs.

“The catalyst for his execution was the scores of accidental deaths resulting from counterfeit and substandard drugs.”

On the same day that Mr Zheng was executed, the SFDA issued new Measures on the Administration of Drug Licensing (the 2007 Measures) to replace the measures

that Mr Zheng had issued personally in 2005 (the 2005 Measures). The 2007 Measures were an attempt to close the loopholes inherent in the 2005 Measures by making the drug licensing system more transparent. For example, the SFDA had a new obligation to make public announcements on significant matters that were in the public interest. In addition, the SFDA was required to make collective decisions (rather than implementing decisions made by one, senior official) regarding drug licensing. Unfortunately, despite these measures, history seems to be repeating itself. Between January and the end of April 2010, two SFDA officials were arrested for taking bribes. Along with these two officials, three staff members of the National Institute for the Control of Pharmaceutical and Biological Products (the National Institute)—a semi-governmental agency affiliated with the SFDA—were arrested for taking bribes and one staff member of the National Institute was suspended.

It is believed that the arrests and suspension are related to the recent rabies vaccine incident. On 3 December 2009, the SFDA posted on its official website the news that



two bio-pharmaceutical companies had been found to have produced and sold seven batches of substandard rabies vaccine totalling 210,000 doses, between July and October 2008. Out of 33 provinces, 27 were affected; the 210,000 doses of vaccine were entirely used up. Although no deaths resulting from the substandard vaccines were reported, it is believed that people who have received the substandard doses could face life threatening illness.

On 15 May 2010, SFDA announced the penalties levied against the two companies: the income from the illegal production and sale of the substandard rabies vaccine was confiscated; the two companies received fines equal to three times the total value of the vaccine they produced, RMB 25.6 million for one company and 5.6 million for the other; the companies must cover the costs of re-inoculation; and their GMP certifications were withdrawn, preventing them from continuing to produce the vaccine. In addition, the nine personnel in the two companies directly responsible were prohibited from engaging in the pharmaceutical industry for 10 years.

To address these new problems, the SFDA issued a series of rules and regulations to strengthen the supervision and monitoring of the health and pharmaceuticals industry in the areas of manufacturing and trading. The most important of these are

- The Circular on Prompting Pharmaceutical Manufacturers to Implement the Quality Supervisor System, issued by the SFDA on 8 April 2009 (the Quality Supervisor System).
- The 2010 Working Plan on the Supervision and Monitoring of the Manufacturing of Pharmaceuticals (the 2010 Manufacturing Supervisory Plan).
- The 2010 Working Plan on the Supervision and Monitoring of the Trading of Pharmaceuticals (the 2010 Trading Supervisory Plan).

The New Regulations

Important highlights from the new regulations include the following developments.

The Quality Supervisor System

This system was first adopted in Guangdong Province on an experimental basis

in July 2007. Each pharmaceutical manufacturer appoints from its senior management a designated quality supervisor who must have five years' practical experience in the manufacture and quality management of pharmaceuticals. This supervisor conducts a series of internal checks that are intended to ensure that the drugs comply with the standard code, and bears overall responsibility for the quality of pharmaceuticals and their release onto the market.

A pharmaceutical manufacturer must identify its designated quality supervisor to the relevant local FDA. A manufacturer of certain, critical pharmaceutical items such as blood, vaccine, and injection products must identify its supervisor to the provincial level FDA. In the case of a change of a supervisor, the pharmaceutical company must report the change to the FDA and explain why it was necessary.

Examination on GMP Certification

The SFDA and local FDA are required to adopt a system to certify the new version of the GMP. Pharmaceutical manufacturers are required to establish implementation plans for facility reconstruction and software upgrades, etc. Newly established manufacturers of essential and injection drugs should take the lead in implementing the new pharmaceutical GMP.

The SFDA and local FDA must organise the training of GMP inspectors and develop the annual work plan for GMP "Tracing Inspections", whereby inspection results are put into a credit evaluation system. The SFDA and FDA must also deal with those manufacturers that fail to meet the requirements of the GMP.

Electronic Supervisory Codes for Pharmaceutical Manufacture and Trading

The local FDA must implement electronic supervision codes for the manufacture and sale of vaccines, blood products, injections of traditional Chinese medicines, narcotic medicines and psychotropic substances to ensure that manufacturing and trading enterprises connect to the network. The FDA must also grant the relevant electronic supervision code, complete its uploading and verification, and process the code warning information online in a timely manner.

Strengthening of the Good Sales Practice System

The local FDA must establish routine Good Sales Practice inspections on the operations of pharmaceutical businesses and their sales. The results of these inspection must be included in a quality credit system and published in a timely manner.

Credibility System for Pharmaceutical Trading Companies

The local FDA must develop a classification and implementation plan for the credit system for pharmaceutical companies. Routine monitoring and inspection and other related information, including offences, must be listed on companies' records, and incentive and disciplinary systems will be established accordingly.

Supervision and Management of Medicine Usage

The local FDA must check qualification records, goods inspection records and acceptance and purchase history of all medicine purchases made by medical institutions. The local FDA must also check the storage conditions in which medical institutions are holding stock to ensure the safety and efficacy of medical quality.



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New Guidance on US Expatriation Exit Tax

By Andrew Stone and David Adler

Late in 2009, the US Department of Treasury published guidance concerning the exit tax applicable to expatriates and former long-term green card holders. The Heroes Earnings Assistance and Relief Tax Act of 2008 (the HEART Act) created a “mark-to-market” exit tax applicable to certain US citizens and long-term green card holders who expatriate or relinquish their green cards, as well as a succession tax on certain US citizens or residents who receive gifts or bequests from these individuals.

A long-term green card holder is a person who has been a lawful permanent resident of the United States for at least

eight of the past 15 taxable years. Green card holders should take particular note of the exit tax regime, as the revocation or expiration of a green card can trigger the application of the exit tax.

“Green card holders should take particular note of the exit tax regime.”

Under the mark-to-market exit tax regime, an expatriating individual who has a net worth of at least US\$2 million or an average income tax liability for the previous five years of at least US\$145,000 (2010 figure, adjusted annually for inflation),

or who fails to certify as to compliance with all US federal tax obligations for the previous five years, will be deemed to have sold their worldwide assets for fair market value on the day before expatriation. This “covered expatriate” (CE) will pay tax on any resulting net gains in excess of an inflation-adjusted exclusion amount, currently US\$627,000. US persons receiving gifts or bequests from a CE will be taxed on those gifts or bequests at the highest gift or estate tax rate in effect at that time. Excepted from this succession tax are transfers to spouses and charities. On 15 October 2009, the US Treasury released guidance concerning the exit tax and related issues in Notice 2009-85 (the Notice). Guidance on the succession tax will be issued separately.



The Notice provides that the application of the tax liability and net worth tests, which are used to determine whether a CE is subject to the exit tax, continues to be governed by Section III of Notice 97-19. Notice 97-19 provides that the entire net income of joint filers is included for the purpose of the tax liability test, and that all property subject to gift tax if owned by a US person, as well as all property in which a use right is held, are included for the purpose of the net worth test.

“Expatriation will not eliminate exposure to US income tax on US source income.”

A CE will include in their exit tax base any interest in property that would have been taxable as part of their gross estate for federal estate tax purposes had they died a citizen or resident of the United States on the day before expatriating. A CE must therefore obtain a fair market value appraisal of any property and attach the appraisal to the final US income tax return.

For the purpose of determining the exit tax base, the CE will be deemed to own a beneficial interest in each nongrantor trust (any trust that is not treated as a grantor trust as to the CE) that would not be included in the CE's gross estate and that is not a nongrantor trust subject to the statutory withholding regime. A CE may elect out of the withholding regime for distributions from nongrantor trusts by electing to include their interest in the trust in the exit tax base. A private letter ruling as to value is a condition of this election. A CE who is a beneficiary of a nongrantor trust and does not elect to include the value of their interest in the exit tax base must file a Form W-8CE with the trustee. A CE with any interest in a nongrantor trust on the day before expatriation must file a Form 8854 annually to certify that no distributions have been received or to report the distributions received, unless the CE elected to have their entire interest in the trust included in the exit tax base.

The Notice further provides that the exclusion of the first US\$627,000 (for 2010) of net gain from the exit tax is to be allocated *pro rata* among all assets included in the exit tax base. This method is significant because a taxpayer may elect to defer the exit tax payable with respect

to a particular asset, provided that security for the ultimate payment of the tax is posted and interest is paid over the deferral period. Losses may be taken into account only to the extent permitted by the Internal Revenue Code, *i.e.*, subject to the annual capital loss carryforward limitation of US\$3,000.

A CE receives a basis adjustment for the amount of gain or loss deemed realized without regard to the current US\$627,000 exclusion amount. This is, however, of little value for property other than US *situs* real estate or business property, as nonresident aliens are generally not subject to US tax on capital gains. In relation to the rule that allows inbound nonresident aliens a step up in basis for property held on the first day the alien becomes tax resident, the Notice warns that Treasury intends to exclude generally any property that is a “United States real property interest” and any property used or held for use in connection with the conduct of trade or business within the United States.

Recipients of “ineligible deferred compensation”—basically deferred compensation for which the payor is not a US person or does not otherwise assume the responsibility for withholding—must file a W-8CE with the payor. The payor is required to provide a written statement outlining the current value of the CE's accrued benefit on the day before the expatriation date. This amount is then included in the CE's exit tax base. A CE who was a citizen or long-term resident for only part of the taxable year must file a dual status return (a Form 1040NR with a Form 1040 attached as a schedule). In addition, all CEs must file with their final income tax return a certification on Form 8854 that the CE has been in compliance with all federal tax laws during the five years preceding the year of expatriation.

“This method is significant because a taxpayer may elect to defer the exit tax payable with respect to a particular asset.”

The benefit of expatriating under the new mark-to-market exit tax regime is the removal of non-US source income from the jurisdiction of the US income tax, and

the removal of non-US *situs* property from the jurisdiction of the US estate, gift and generation-skipping transfer tax. As the basis in loss assets will be stepped down to fair market value on expatriation, however, there is a risk of creating phantom gain on the subsequent disposition of such properties that are US real or business property. Expatriation will not eliminate exposure to US estate, gift and generation-skipping transfer tax on *inter vivos* or testamentary transfers of property that is deemed situated in the United States for gift or estate tax purposes, as applicable. Nor will it eliminate exposure to US income tax on US source income. Expatriation also creates exposure to the succession tax if gifts or bequests to US persons are contemplated. For taxpayers possessing assets with substantial built-in losses, however, the present time may be an attractive time to expatriate if the exit tax cost for doing so is low.



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The UK Fiscal Landscape for Multinationals: A Turning Point?

By Peter Nias and James Ross

The arrival of a new UK coalition Government is a good opportunity to take stock of the tax environment for inward investors into the United Kingdom.

The new Government has committed itself to a major reform of the corporation tax system over the next five years, with the aim of improving competitiveness, simplifying reliefs and allowances and reducing the headline rate of corporation tax. As a first step, the main rate of corporation tax will be reduced in stages from 28 per cent to 24 per cent by April 2014.

When looking at the longer term direction of policy and enforcement, however, we had already started to see a more business friendly approach under the previous Government, and expect this to continue.

Foreign Profits Reforms

Whilst by 2008 there had been rumbling discontent about both the relatively high headline rate of corporation tax in the United Kingdom and the system's increasing complexity, the catalyst for the Government's policy shift seems to have been the decision by a number of UK-headquartered corporates to "invert" their structures and establish a new holding company in a more congenial jurisdiction. These decisions in turn were triggered mostly by the then Government's initial proposals in 2007 for the reform of the taxation of companies' foreign profits.

The centrepiece of the reforms was a tax exemption for foreign dividends. Coupled with this, however, was a proposal for significant changes to the controlled foreign company (CFC) rules, which are designed

to prevent diversion of profits from the United Kingdom and therefore from the UK tax net.

The concern raised by many of the migrating companies was that the proposed reforms to the CFC rules would expand their scope significantly so that they would tax not only profits diverted away from the United Kingdom but also profits that had no UK nexus at all, in particular, profits from intellectual property (IP) that was developed and exploited entirely outside the United Kingdom. Far from benefiting from the dividend exemption, these companies would, it was argued, end up paying more tax as a result of the overall package of reforms.

It is to the credit of the previous Government that it listened to and took into

account representations from interested businesses. The dividend exemption was decoupled from the CFC reforms and was introduced from 1 July 2009. Proposals to expand the scope of rules restricting the deductibility of interest and other financing costs were also moderated, although some changes were made in this area.

“The revised CFC reform proposals are now considerably more palatable than their predecessors.”

Most importantly, the revised CFC reform proposals are now considerably more palatable than their predecessors. The discussion document issued in early 2010 accepted that the active management of IP is a legitimate and necessary function of the modern multinational and that where a UK-based group undertakes such functions outside the United Kingdom, it is not necessarily trying to avoid UK tax. Consequently, the reformed CFC rules are expected to introduce an exemption from the CFC rules for profits attributable to the active management of IP abroad.

Similar conclusions were reached in relation to the active management of cash. The discussion document also proposes to introduce a similar exemption for the profits of foreign treasury subsidiaries.

There remain areas of concern in the current proposals, most notably in relation to IP transferred by a UK company to a foreign subsidiary before it has significant value. HM Revenue & Customs (HMRC) takes the view that transfer pricing legislation provides it with insufficient protection where the IP subsequently rises in value, and has proposed that in such circumstances, a charge should be imposed on any subsequent increase in the manner of an earn-out arrangement on a business disposal. Many practitioners and taxpayers will see this as taxation with the benefit of hindsight, given in most cases there will be no way of knowing, when IP is transferred out of the United Kingdom, whether it will ultimately be profitable or not. There is no suggestion that HMRC would be prepared to give relief for expenditure incurred abroad following a transfer on IP that never becomes profitable.

Despite this, there are reasons to be cautiously optimistic that the reforms will ultimately provide greater certainty to UK-based multinationals and will accord with modern business practice.

The readiness of the previous Government to listen to meaningful representations has also been evident in its ongoing consultation on the taxation of foreign branches, which seems likely to result in the introduction of a “pooling” system, allowing the losses of one branch to be set against the profits of another.

The new Government has indicated that it will seek to introduce interim improvements to the CFC rules in spring 2011, whilst consulting on fuller reforms to be introduced in 2012. Reforms to the taxation of branches (which seem likely to preserve branch loss relief) are scheduled for 2011.

Looking further ahead, the previous Government also proposed the introduction of a “patent box” from April 2013, whereby income from patents would be taxed at a rate of 10 per cent. The new Government has promised a review of the taxation of intellectual property, but has not indicated whether it will pursue this specific proposal.

Transfer Pricing

Similarly positive developments can be seen in the field of transfer pricing. Whilst the law on transfer pricing has not changed, HMRC has embarked on an extensive training programme for inspectors with the aim of professionalising and streamlining its handling of enquiries. The aim is now to complete all transfer pricing enquiries within 18 months (three years for the most complex cases) and to staff those enquiries with officials who have both greater technical and greater business expertise. It is to be hoped that this will result in more focused enquiries and an end to the somewhat drawn out investigations of the past in which inspectors often had a tendency to focus disproportionately on relatively trivial matters.

The inevitable corollary of this, however, is that the taxpayer will need to be better prepared. There is some evidence that HMRC is challenging more formulaic transfer pricing studies and seeking more detailed functional analyses that look to the precise nature and value of activities carried on by the important individuals within the business: the “significant

people” function. In common with the Organisation for Economic Co-operation and Development, HMRC is also increasingly ready to countenance the use of a profit split method where it concludes that no appropriate comparable is available.

Conclusion

We expect that the development of a more business friendly approach within HMRC will continue, and possibly even accelerate, under the new Government. Reductions in either the corporate or individual tax burden are perhaps less likely in the short term; the size of the United Kingdom’s current budget deficit is unlikely to permit it. Moreover, public concern over tax avoidance seems unlikely to abate.

Nonetheless, the United Kingdom’s fiscal environment is changing and HMRC’s more professional and responsive approach could offer significant benefits to businesses locating here, but only those businesses that are sufficiently prepared to take advantage of it. Businesses that skimp on preparation—particularly in the field of transfer pricing—may encounter unwelcome surprises.



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A New Front in Anti-Bribery Enforcement

By John Kocoras and Brigid Breslin

The global battle against commercial bribery has advanced dramatically with the passage of the UK Bribery Act 2010 (Bribery Act). Following recent criticism, authorities in the United Kingdom appear eager to demonstrate with the Bribery Act that they are as serious about compliance as the United States has shown it is with the Foreign Corrupt Practices Act (FCPA). Any multinational company with operations in the United Kingdom or United States should examine closely its compliance policies and procedures in an effort to avoid being one of the Bribery Act's earliest examples or the FCPA's next catch.

US FCPA

The FCPA, enacted in the United States in 1977, generally prohibits "corrupt" payments to foreign officials for the purpose of obtaining or keeping business, including payments made by a company's third-party agents in foreign countries. While such payments are generally exchanged outside the United States, US lawmakers have attempted to extend the FCPA's reach

as far as they can. The FCPA applies to US citizens, nationals and residents, as well as corporations that have securities registered in the United States or which make certain securities disclosures in the United States, and corporations and associations organised under a US state's law or whose principal place of business is in the United States. It also encompasses the conduct of foreign subsidiaries or foreign agents of US companies where the US companies authorise, direct or control the activity.

"The OECD has heaped praise on the United Kingdom for the Bribery Act."

In addition to its anti-bribery provisions, the FCPA contains accounting provisions that generally require companies with securities listed in the United States to keep books and records that reflect transactions accurately, and to maintain an adequate system of internal accounting controls. The accounting provisions are sometimes invoked where authorities face significant

challenges in proving that someone actually paid a bribe, but where they have proof that the books are purposefully inaccurate.

The Anti-Bribery Convention

In an effort to enhance global cooperation in combating bribery, the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) came into force in 1997. The Anti-Bribery Convention requires its 38 signatory nations, including the United States and United Kingdom, to enact and enforce laws prohibiting international commercial bribery.

In October 2008, the OECD's Working Group on Bribery issued a report stating it was "disappointed and seriously concerned" with the United Kingdom's compliance with the Anti-Bribery Convention. While the report noted that the United Kingdom had made some progress in combating bribery, the Working Group emphasised that it "strongly regrets the uncertainty about the UK's commitment to establish an effective



corporate liability regime” and urged the United Kingdom “to adopt appropriate legislation as a matter of high priority.”

UK Bribery Act 2010

The United Kingdom responded with aggressive legislation that in many significant respects reaches further than the FCPA.

The Bribery Act provides criminal penalties against individuals and corporations for offering, making, or requesting or receiving a financial or other advantage in return for the improper performance of a public or private business activity. It also imposes criminal liability on corporations for failing to prevent such bribes, where the bribes are made or received by a person performing services for the corporation, including third-party agents. Notably, however, the Bribery Act provides that a company can avoid liability if it had in place “adequate procedures” designed to prevent individuals associated with the company from paying bribes.

While the UK Bribery Act does not contain separate accounting provisions, in many respects it imposes greater anti-bribery restrictions than the FCPA. It applies to any corporation doing business in the United Kingdom that pays a bribe overseas, even if the bribe does not otherwise

involve activity in the United Kingdom. Additionally, the Bribery Act reaches bribes that are intended only to influence private actors as well as bribes to influence public officials. Moreover, the Bribery Act makes it a crime for a corporation to fail to prevent a bribe by a person performing services for the corporation, unless the company had in place adequate procedures designed to prevent bribes. Any adequate procedures defence is certainly going to be delicate however; a company relying on this defence to escape liability will have to explain why the adequate procedures failed to prevent a bribe.

The OECD has heaped praise on the United Kingdom for the Bribery Act, stating that the United Kingdom has sent “a strong message of its commitment to fight against bribery... The UK is now well placed to help lead this fight.”

If enforcement efforts are as strong as the Bribery Act’s terms, the United Kingdom will be playing a powerful role in fighting bribery and we will likely see significant activity affecting a broad range of companies soon after it comes into force (expected to be in October 2010). Similar to FCPA enforcement, those efforts are likely to focus on industries where contact with public officials, including officials of state-owned enterprises, is common. Key

industries will likely include energy, defence, health care, pharmaceuticals and medical devices, telecommunications and real estate.

Any multinational company operating in the United States or United Kingdom would be wise to focus on anti-bribery policies, procedures, and training and deliver pointed communications from management condemning bribery.



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US FOREIGN CORRUPT PRACTICES ACT AND UK BRIBERY ACT

Key Similarities	Key Differences
The FCPA and Bribery Act provide criminal penalties for individuals and companies involved in corrupt payments overseas to obtain or maintain business.	The FCPA requires companies listed in the United States to maintain accurate books and records. The Bribery Bill does not contain accounting provisions.
The FCPA and Bribery Act are designed to reach conduct by companies that are based outside the United States or United Kingdom, respectively, but are linked to the United States or United Kingdom.	The Bribery Act reaches foreign payments by any company doing any business in the United Kingdom. The FCPA reaches foreign payments by companies only with securities registered in the United States or making certain disclosures there, companies organised under a US state law, or companies with a principal place of business in the United States.
An unlawful bribe under the FCPA or Bribery Act need not necessarily be a monetary payment.	The Bribery Act reaches bribes exclusively within the private sector that are not designed to affect public officials; the FCPA does not.
Corporate liability for violations of the FCPA and Bribery Act can be based on payments made by third-parties for the benefit of the corporation.	The Bribery Act makes it a crime for a company merely to fail to prevent a person associated with it from paying an illegal bribe; the FCPA does not.
Essential components for avoiding or reducing liability for violations include appropriate policies, procedures and training.	The Bribery Act provides expressly an “adequate procedures” defence for an organisation accused of failing to prevent a bribe. The FCPA does not include similar corporate defences.

Merger Control: Gun Jumping Goes Global

By Joe Winterscheid, Jon Dubrow and Carrie Amezcua

Broadly defined, “gun jumping” refers to unlawful premerger coordination between the parties to an M&A transaction. It can occur in two distinct contexts. First, *procedural* gun jumping occurs when the merging parties fail to observe mandatory premerger notification and waiting period/clearance requirements under applicable merger control laws. Second, when the merging parties are competitors, gun jumping can occur as a form of *substantive* antitrust offence where the parties coordinate their competitive conduct prior to the actual consummation of the transaction.

While these procedural and substantive gun jumping concerns have a long history in the United States under the Hart-Scott-Rodino Act and Section 1 of the Sherman Act, the European Commission and EU Member State authorities are now also pursuing merging companies under similar

legislation. Merging firms must therefore take these new developments into account when negotiating merger agreements and conducting due diligence and integration planning activities in Europe and elsewhere.

“Gun jumping” refers to unlawful premerger coordination between the parties to an M&A transaction.”

Procedural Gun Jumping

The most commonly recognised form of gun jumping occurs when parties effectively close a notifiable transaction without observing applicable waiting period and/or clearance requirements. In the European Union, for example, this would occur if the acquiring company exercises control over the target prior to receiving clearance from the Commission under the European Merger Control

Regulation (ECMR). This form of gun jumping subjects the acquiring firm to potential fines under the ECMR, irrespective of whether the underlying transaction raises competitive concerns (*e.g.*, whether or not the parties to the transaction are competitors).

In 2009, the Commission fined Electrabel EUR 20 million for having committed this type of gun jumping offence. This development is not only notable for the amount of the fine imposed, but also because Electrabel held less than 50 per cent of the target company. The Commission nonetheless found that Electrabel had acquired *de facto* control over the target because it was the largest minority shareholder and held a majority of votes at shareholders meetings.

Substantive Gun Jumping

As a general rule, antitrust laws prohibit competing firms from coordinating their competitive conduct. This type of conduct



is generally prohibited in the United States under Section 1 of the Sherman Act and in the European Union under Article 101 of the Treaty on the Functioning of the European Union (TFEU). There is no exception to this prohibition merely because it occurs in anticipation of a contemplated merger. Rather, the competition authorities take the view that the parties to a proposed transaction are expected to operate as independent competitors until the deal is actually closed. As a corollary, pre-closing coordination of competitive conduct is prohibited, irrespective of whether the transaction is notifiable under applicable merger control laws and, indeed, irrespective of whether a notifiable transaction has already satisfied applicable waiting period/clearance requirements.

Traditionally, the Commission has exhibited a somewhat compartmentalised enforcement policy with respect to coordinated conduct between competitors, using the ECMR for merger-related cases and Article 101 TFEU for non-merger cases. In December 2007, however, the Commission conducted dawn raids at the offices of Ineos and Norsk Hydro during the pendency of Ineos' proposed acquisition of Norsk Hydro's polymer business. The purpose of these raids was to investigate whether the parties had been exchanging competitively sensitive information that, according to the Commission, could be in violation of both the ECMR and Article 101 TFEU. Although the Commission closed its gun jumping investigation in 2008, this case is notable in that it represents the first suggestion by the Commission that it may attack information exchanges occurring in the premerger context under Article 101 TFEU.

Gun Jumping Enforcement at Member State Level

Transactions that lack "Community dimension" under the ECMR may nevertheless be subject to mandatory premerger notification and waiting period requirements at Member State level. Recent developments demonstrate that the national enforcement authorities share the Commission's concerns about gun jumping. In the last three years, Norway, Germany and Romania have each imposed fines against parties for failing to observe national premerger notification and waiting period requirements. The new aggressiveness with which the

national authorities are now pursuing potential gun jumping violations is further demonstrated by the Romanian competition authority's December 2009 dawn raid on Advent Group and Ozone Laboratories to investigate possible premerger gun jumping. Although the national fines imposed thus far have all been predicated upon failure to comply with procedural notification and clearance requirements, there is every likelihood that the national authorities ultimately will follow the Commission's lead in the Ineos case and investigate substantive violations stemming from improper competitive coordination and/or information exchanges in the premerger context as well; conduct that might well violate Article 101 TFEU even if the underlying transaction is not subject to premerger notification requirements.

Analysis and Recommendations

Early involvement by antitrust counsel in the M&A process is always prudent to identify potential antitrust risks associated with the proposed transaction and to develop an effective strategy for minimising those risks. These recent developments reinforce the need to involve antitrust counsel at the earliest stages of any transaction to avoid potential gun jumping issues. Failure to do so may subject the parties to significant fines. Substantive risks are more pronounced in the European Union than in the United States, given the more stringent rules governing information exchanges under Article 101 TFEU. Even if fines are not imposed ultimately, parallel gun jumping investigations not only add cost to the M&A process, but also have the negative effect of distracting the enforcement authorities from focusing on the merits of the deal, and may therefore delay the clearance process.

Early involvement by antitrust counsel is essential to address the following gun jumping "hot spots":

1. Identifying jurisdictions where premerger notification is required so as to avoid inadvertent non-compliance with applicable filing requirements.
2. Assisting the parties in developing appropriate limitations and protocols on due diligence activities to avoid claims that they have engaged in impermissible information exchanges.
3. Reviewing drafts of the merger or purchase agreement to ensure that

- They contain appropriate conditions to closing vis-à-vis required regulatory clearances.
- Any proposed "drop dead" date is sufficient to cover the anticipated regulatory clearance process.
- Any provisions relating to the acquired company's pre-closing conduct are properly limited so as to avoid a claim that *de facto* control has been exercised prematurely or that impermissible coordination of competitive activity has occurred.

4. Assisting the parties in developing legally-compliant integration planning activities to avoid a claim that the parties have crossed the line between permissible "planning" and impermissible pre-closing coordination.

Early involvement by antitrust counsel in the M&A process is essential to avoid these risks. And in the current gun jumping enforcement climate, by neglecting to engage antitrust counsel early on in the process, the parties may unwittingly be playing a game of Russian roulette.



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International Cartel Enforcement: On the Rise and More Severe

By Craig Seebald and Clive Stanbrook OBE QC

Recent increases in anti-cartel enforcement activity have had important consequences. Now, more than ever, companies are advised strongly to implement vigorous compliance programmes in every jurisdiction in which they operate. Should an investigation be launched, companies must be prepared to coordinate their responses to investigations globally. Companies must also evaluate the situation of individual employees, who may require separate counsel. With authorities demanding longer prison sentences and larger criminal fines, companies and individuals will be more willing to contest charges in court and there will likely be more criminal litigation of cartel claims.

Signs of Increased Anti-Cartel Enforcement Worldwide

Signs of this increased enforcement by competition authorities are visible in a number of countries. For example, in Brazil, which enacted a law criminalising cartels in 1990, the number of warrants served in cartel investigations between 2007 and 2009 rose to over 200, up from just 30 in the previous three years. Countries that have not had criminal cartel regimes previously are adopting them. These countries include Australia, where criminalisation of cartel behaviour came in to effect in 2009. Still others may adopt criminalisation; a discussion paper issued by New Zealand's Ministry

of Economic Development suggests that it is considering following suit in 2010 or 2011. Existing criminal anti-cartel regimes are also toughening. In 2009, Canada enacted a US-style "*per-se*" offence, under which it will no longer be necessary for authorities there to prove an undue lessening of competition due to the cartel activity in order to make a case.

“Authorities appear more willing to investigate international cartels and prosecute foreign nationals.”

There has been a similar expansion in amnesty or leniency programmes. More than 50 countries now have some type of leniency programme that encourages cartel members to report cartels to the government in return for immunity or reductions in fines. For instance, Japan first adopted a US-style leniency programme in 2005, expanding it in 2009 to accommodate an increased number of leniency applicants. Authorities consider these programmes to be an important tool in their criminal enforcement toolbox for de-stabilising cartels, as well as investigating and prosecuting cartel members. The rise in enforcement activity continues to drive amnesty applications, which in turn aids authorities in pursuing their enforcement goals.

Criminal enforcement activities have also broadened in scope, as authorities appear more willing to investigate international cartels and prosecute foreign nationals. The United States in particular has been aggressive in prosecuting non-US residents, and other jurisdictions are following this lead. Cross-border enforcement is also on the rise, as authorities in various countries are increasingly coordinating their investigations. While coordination among countries with established enforcement regimes continues, countries showing a new emphasis on enforcement are also joining. For example, Brazil conducted its first joint raid with the US Department of Justice and European Commission in February 2009. Such international cooperation is likely to increase.

Further, penalties for cartel behaviour are becoming more severe. In the United States, prison sentences for criminal cartel conduct now average two years. Penalties for repeat offenders, particularly in Europe, are also harsh.

Civil enforcement, too, is on the rise. Civil penalties for cartel behaviour can be very large, particularly in jurisdictions that impose joint and severable liability or treble damages. Fines are determined frequently by the impact of the cartel's conduct on sales or commerce. When authorities investigate international cartels, the affected commerce can be global in scope and the attendant damages can be

enormous. Civil actions, which often follow in the wake of criminal prosecutions, add enormous cost for defendants and these private actions—already common in the United States—are on the rise in Europe and Canada.

Consequences of Increased Global Enforcement

All of this increased global enforcement has important ramifications for companies operating internationally and for their employees.

First, the need for companies operating internationally to implement strong compliance programmes in every jurisdiction in which they operate is greater than ever. While this has always been good practice, increased international enforcement and broad liability for subsidiary companies makes it crucial now. After the *Akzo Nobel* decision, the law of the European Union will hold a parent company presumptively liable for violations of EU competition law committed by its wholly-owned subsidiary, even if the parent did not engage in the behaviour itself. Companies must therefore audit their own operations and those of their subsidiaries to ensure compliance. Even joint venture investors must be careful if they have a majority share in a joint venture.

Second, companies should be ready to coordinate responses to simultaneous investigations around the world and must be prepared for dawn raids in multiple jurisdictions. This is important for several reasons. As noted above, criminal and civil penalties for cartel behaviour are increasing worldwide and countries are more inclined to investigate and prosecute companies operating internationally. Companies must therefore be attuned to the possibility that authorities in different countries could investigate and prosecute the same behaviour and that the overlapping jurisdiction of enforcement authorities may lead to “double counting” for the same behaviour and even higher aggregate liability. Additionally, whether and in what jurisdiction (or jurisdictions) the company

should seek amnesty is now a much more difficult question to answer. Tensions between the enforcement goals of different countries may affect a company’s strategy. For example, a company may find that the cooperation provisions of a leniency application in Europe expose the company’s employees to criminal prosecution in the United States. A timely, coordinated response is essential to give the company the best opportunity to navigate these thorny issues.

“Brazil conducted its first joint raid with the US Department of Justice and European Commission.”

Third, countries around the world are likely to follow the United States’ lead and increasingly prosecute foreign nationals. The likelihood that foreign executives will be investigated and prosecuted by a country raises issues of jurisdiction and representation, which should also be addressed at an early stage. Extradition to the United States is also a possibility. Depending on the situation, foreign executives may need to consider their international travel arrangements and separate counsel may need to be found.

Fourth, increases in international enforcement and tougher penalties will change how companies and individuals evaluate their options when investigated. In the past, even the most serious criminal cases often concluded with plea bargains. Prison sentences were frequently in the order of a few months and fines were often modest, so the cost of entering into a plea agreement was tolerable. With authorities worldwide demanding longer jail time and seeking larger fees, plea agreements may be less attractive than in the past. And defence wins in cases such as *Stora Enso* (publication paper) and *Val M. Northcutt* (marine hoses) in the United States and *British Airways* (passenger fuel surcharges) in the United Kingdom suggest that high burdens of proof and other factors make

criminal prosecutions difficult for authorities to win at trial. While individual cases vary, in an environment of stricter enforcement, more companies and individuals may be willing to test the authorities’ cases rather than enter plea agreements.

In summary, the strengthening of anti-cartel regimes, prosecutors’ broadening reach, increased international cooperation and stiffening penalties combine to make these issues more important than ever for companies and their employees.

John Blake also contributed to this article.



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China's Anti-Monopoly Law: Experience and Lessons Learned After Two Years

By Henry (Litong) Chen, Alex An and Brian Fu

On 1 August 2008, China's Anti-Monopoly Law (AML) came into force. After two years' experience of China's first comprehensive antitrust law, some important lessons have been learned, but some key issues still remain unresolved.

Overlapping Laws

The AML adds another regulatory layer to the body of existing laws that apply to trade in China. One major issue is the emerging tension between the AML and some of these other laws, in particular the Anti-Unfair Competition Law (AUCL) and the Price Law.

In China, an “exclusive sales arrangement”—an arrangement where a seller provides a certain economic benefit in exchange for the counterparty's promise

not to sell a competitor's product—may trigger the application of both the AML and the AUCL. If the seller is a business operator with a dominant market position (DMP operator), an exclusive sales arrangement may be considered an abusive action under Article 17.4 of the AML because it restricts the counterparty to conducting transactions only with the DMP operator or businesses designated by the DMP operator. Similar compliance concerns may be triggered under the AUCL and provincial anti-unfair competition regulations, which view an exclusive sales arrangement as commercial bribery.

“The AML does not provide for criminal liability for price fixing.”

The AML prohibits a DMP operator from unjustifiably restricting a counterparty from conducting a transaction only with the DMP operator or with other designated business operators. The word “unjustifiably” indicates that a “rule of reason” standard should be used to evaluate the DMP operator's conduct before issuing a decision. Under the AUCL and related provincial level regulations, however, there is no such balancing test and an exclusive sales arrangement is often construed to be a *per se* violation. Also, defences that might be available under the AML would not be applicable to the cases investigated under the AUCL. The enforcement authorities (such as the Administrations for Industry and Commerce) would thus assess the legality of such arrangements according to their own views of whether the arrangements fall under the AML or AUCL.



Criminal Liability

Article 52 of the AML provides for criminal liability for certain serious instances of obstruction of justice of a governmental investigation, such as refusing to provide related materials and information; providing fraudulent materials or information; concealing, destroying or removing evidence; and refusing or obstructing the investigation in other ways. The AML does not, however, provide for criminal liability for price fixing. As a result, the governmental authorities must “borrow” other criminal law provisions to impose criminal liability in incidences of price fixing.

In January 2010, companies in Liuzhou and Nanning colluded to fix prices for rice powder. Although the AML does not impose criminal sanctions for this conduct, the companies were fined and individuals arrested under the criminal provisions of Article 226 of the Criminal Law (1997), which prohibits anyone from forcing others to buy or sell goods or services. Companies and individuals that engage in serious antitrust violations may therefore be subject to criminal prosecution in China, albeit not under the AML.

Protecting Competition

The question still remains whether the AML protects “competition” or individual competitors. The AML purports to protect “fair market competition” and uphold “the interests of consumers and social public interests.” During the legislative process, whether or not the AML should protect the competitors specifically (*i.e.*, business operators) was hotly debated. In the end, no clause was included to this effect but, in practice, some of the enforcement authorities have nonetheless taken the view that protecting competitors is part of their enforcement mission under the AML.

For example, in 2008, the Coca-Cola Company moved to expand its operations in the fast-growing Chinese beverage market with a US\$2.5 billion bid for the major Chinese juice maker, China Huiyuan Juice Group Ltd. The Ministry of Commerce (MOFCOM) blocked the acquisition. In its decision, MOFCOM stated that Coca-Cola’s acquisition of Huiyuan would

allow Coca-Cola to leverage its dominant position in the carbonated soft drinks market into the fruit juice market and bring two leading Chinese fruit juice brands under common control, thereby threatening to impede the future growth of smaller Chinese fruit juice companies. MOFCOM’s decision was widely criticised as anticompetitive because it protected small and medium-sized enterprises, which is not mandated by the AML.

Abuse of Administrative Powers

Although Chapter 5 of the AML prohibits the abuse of administrative powers to eliminate or restrict competition, it seems that the Chinese Government lacks the will to enforce this important provision. On 5 June 2009, the State Administration for Industry & Commerce (SAIC) issued procedural regulations (the Regulations) to address this Chapter. Notwithstanding the clear mandate under Chapter 5, the Regulations provide that the SAIC does not have the power to enforce the AML against a governmental agency or public affairs organisation that abuses administrative power. Rather, the SAIC and its local branches can only make “suggestions” to government agencies about government conduct that may appear to be abusive practices as defined by the AML, leaving it to the government agency itself to take corrective action. This regulatory landscape means that government agencies and administrative organisations will become *de facto* AML enforcers, interpreting and applying the relevant provisions of the AML. It also produces a situation where government agencies are responsible for policing their own conduct, which gives rise inevitably to potential conflicts of interest. It therefore remains to be seen whether this pluralistic regulatory regime will result in an effective application of the AML to curb the abuse of administrative power.

In some areas, however, the enforcement authorities have exhibited an activist enforcement agenda under the AML. This is illustrated by MOFCOM’s October 2009 conditional approval of the merger between Panasonic Corp. and SANYO Electronic Co., Ltd. This is the first time the Chinese competition authorities have required divestitures outside of China in a transaction involving two non-Chinese businesses. The closing of this transaction

was subject to clearance by regulatory authorities around the world, but the conditions imposed on the merging parties by MOFCOM under the AML were more severe than those of other international regulatory bodies and included extra-territorial divestiture requirements.

Comment

When the AML came into effect, there was considerable uncertainty as to how it would be applied in practice by the Chinese enforcement authorities. After two years, the basic contours of Chinese enforcement policy under the AML are beginning to emerge and perhaps the most important lesson to date is that, at least as applied in the private sector, the Chinese authorities are committed to aggressive enforcement of the new law. Companies with operations in China need to take this important new reality into account in managing their business.



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Antitrust Enforcement Under the Obama Administration: One Year Later

By Joel Grosberg and Carla Hine

As we wrote last year (*International News*, Issue 1, 2009), the antitrust and competition bar widely expected President Obama's administration to usher in a new era of more aggressive antitrust enforcement. Although there have been few enforcement actions one year into the new administration, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have been active in other areas, including recently revising the Horizontal Merger Guidelines, as well as hearings and speeches on a variety of topics. These efforts suggest that the regulators are looking to reinvigorate antitrust enforcement, making outcomes less predictable.

International Convergence and Cooperation

Unlike during the prior administration, fostering greater convergence among international competition authorities is now a priority for the DOJ. Whereas, previously, the DOJ seemed protective of its autonomy as an antitrust authority, it now considers remedies that other competition authorities receive when closing an investigation. To further promote convergence and a spirit of cooperation, the DOJ and FTC have hired former European Union attorneys as special advisors on international matters.

Domestic Convergence

Under the Bush administration, the FTC and DOJ often disagreed on antitrust policy, but a change in leadership seems to have sparked greater convergence in enforcement policies between the agencies. For example, unlike the FTC, the DOJ did not bring a single monopolisation claim throughout the Bush administration. The differences in the agencies' enforcement policies became apparent in September 2008 when the DOJ issued its report, "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act." The report was meant to be issued jointly by both agencies but they could not agree on the text. Three of the four FTC Commissioners at the time, Jonathan Leibowitz, Pamela Jones Harbour and Thomas Rosch, issued a strong statement against the report calling it "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act." The report was anyway short lived as in May 2009, less than a month after being sworn in as the head of the DOJ's Antitrust Division, Assistant Attorney General Varney withdrew it.

The agencies' enforcement policies are also more aligned in the area of "pay-for-delay", or reverse payments. Reverse payments occur where a brand name

pharmaceutical manufacturer sues a generic drug manufacturer for patent infringement and settles the litigation by paying the generic manufacturer in exchange for the generic delaying entry into the market for a specified amount of time. Putting an end to reverse payments has been a primary focus of the FTC, a position to which the DOJ had been less sympathetic during the Bush administration. The DOJ has since reversed its course, however, and now supports the FTC's efforts in this area.

"The FTC appears emboldened to pursue less conventional approaches."

Merger Enforcement

In the past year, the FTC and DOJ have worked on changing the agencies' guidelines for analysing mergers and acquisitions. To that end, on 20 April 2010, the FTC and DOJ issued revised Horizontal Merger Guidelines (the Guidelines) for public comment. The agencies had not revised the Guidelines since 1992 and intended the revisions to more accurately reflect how they engage in merger review. The most significant change in the Guidelines is the agencies' de-emphasis of market

definition as a threshold step in the merger review process and increased focus on evidence of competitive effects. While the fundamental methodology of merger review has not changed, the revisions reflect a rethinking of how to apply that methodology and provide the agencies with more flexibility in challenging transactions.

“The agencies continue to investigate and challenge non-reportable and consummated transactions.”

Because of a significant decrease in pre-merger notification filings in 2009, it is difficult to assess whether there will be a marked change in merger enforcement under the Obama administration. Nevertheless, the FTC has challenged several transactions, while the DOJ has only challenged one reportable transaction. Moreover, the agencies continue to investigate and challenge non-reportable and consummated transactions. Finally, the FTC and DOJ appear more aggressive in evaluating vertical transactions and more willing to impose behavioural remedies to address vertical concerns, as demonstrated by the consent decrees in *Ticketmaster/Live Nation*, and *Pepsi/PBG*.

Antitrust Enforcement Under Section 5 of the FTC Act

In addition to the US federal antitrust laws, the FTC also enforces Section 5 of the FTC Act, which prohibits “unfair methods of competition.” Historically, the FTC’s jurisdiction under Section 5 has been interpreted to be no broader than its authority granted under other antitrust laws. FTC Chairman Jonathan Leibowitz has indicated, however, that the agency’s authority is in fact broader and the FTC has been more willing to test the boundaries of Section 5. In December 2009, the FTC brought an administrative complaint against Intel Corporation, alleging that Intel engaged in unfair competition in violation of Section 5 by monopolising or attempting to monopolise certain markets for microprocessors. In explaining the FTC’s decision to bring claims under Section 5 and not Sherman Act Section 2, which prohibits certain single-firm conduct, Chairman Leibowitz

and Commissioner Rosch explained that historically the FTC has relied solely on Section 5 “in the most well-accepted areas” of law because, in practice, the antitrust laws were flexible enough to reach most anticompetitive conduct. The Commissioners further argue, however, that US courts over time have limited the reach of antitrust laws over concerns of costly follow-on litigation and treble damages. Unlike the Sherman Act, though, there is no private right of action under Section 5, nor can liability under Section 5 serve as a basis for private action liability pursuant to the Sherman Act. As such, FTC claims of unfair competition under Section 5 mitigate arguably against the threat of follow-on litigation and treble damages.

The FTC appears emboldened to pursue less conventional approaches to challenging conduct it believes to be anticompetitive. Whether this enforcement policy is a result of a change in executive administrations is not clear.

“The agencies are scrutinising closely the agriculture and health care industries.”

Scrutinised Industries

The agencies are scrutinising closely the agriculture and health care industries. Throughout 2010, the DOJ is examining competition in the agriculture industry through a series of joint workshops with the US Department of Agriculture. The workshops’ topics include farmers, poultry, dairy, livestock, and the disconnect between the amount farmers receive and the prices consumers pay.

In addition, the FTC and DOJ are focusing on the health care industry. The FTC is continuing to challenge reverse payments and pursuing actively legislation that would ban reverse payments. Richard Feinstein, the Director of the FTC’s Bureau of Competition, stated that one of the agency’s concerns in the health care industry is to “ensure competitive prices and to drive further innovation.” In that context, the FTC has challenged several transactions in the health care industry (e.g., *CSL/Talecris*), and more closely examined whether

transactions would reduce competition for innovation. (e.g., *Pfizer/Wyeth*, and *Schering-Plough/Merck*). Similarly, the DOJ’s decision to challenge a merger earlier this year between two health insurance competitors in Michigan caused the parties to abandon the transaction.

Practical Guidance

While drawing any solid conclusions about the Obama administration’s antitrust record thus far is premature, there have been certain indicia of change from the prior administration. The DOJ, in particular, is more enforcement-oriented, but also interested in cooperation and convergence at home and abroad. Anecdotally, the DOJ has been opening more investigations; however, those investigations are not resulting in an increased number of enforcement actions. While the enforcement policies of the FTC have not changed substantively, the agency does seem more emboldened to pursue alternative enforcement tactics. As a result, companies contemplating transactions need to evaluate carefully any US antitrust issues. Similarly, companies should re-examine and assess closely their pricing, distribution, and licensing policies to minimise potential antitrust scrutiny by the Obama administration.



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Class Actions: An EU Update

By **Veronica Pinotti** and **Andrea Hamilton**

The evolution of class actions continues to feature prominently on Europe’s competition law landscape. At EU level, the European Commission has supported private enforcement vocally, going so far as drafting legislation to mandate an EU-wide class action mechanism, only to set it aside at the last minute. At national level, certain EU Member States such as Italy have implemented new class action legislation. Others, such as Germany have experienced creative attempts by litigants to introduce class action litigation in existing legal frameworks.

It is worth examining developments in these two key Member States which, together with the United Kingdom, are at the cutting edge of the class action debate. These developments demonstrate that, despite the delay in promulgating EU-wide

legislation, the appetite for European class action antitrust litigation remains sharp and on two tracks—EU-wide and national—creating new and changing risks of which companies must be aware.

“In the first five months of 2010, the new Italian class action mechanism was put quickly to use.”

European Union

The European Commission, the European Union’s competition law enforcer, has long encouraged consumers to pursue private damages actions against companies suspected of infringing competition law. Under the tenure of former Competition Commissioner Neelie Kroes, the Commission took aggressive steps forward

towards the implementation of an EU-wide class action mechanism.

This effort began in 2008 when the Commission issued a White Paper outlining an approach to class action litigation for antitrust claims in the European Union. A white paper signals policy direction and is often a precursor to legislation. This White Paper sought to develop a uniquely “European” model for class actions and would have permitted both opt-in and opt-out classes as well as actions by indirect purchasers. The White Paper sought to enable discovery, albeit with some safeguards and limited damages to the “real value of loss” (as opposed to the United States’ treble damage model). But the White Paper was silent on precisely how these changes would be implemented, as each Member State has its own autonomous judiciary and laws.



In 2009, the Commission promulgated a draft directive based largely on the proposals contained in the White Paper. A directive would require each Member State to conform its own laws to the rules contained in the directive. The draft legislation faced opposition from industry and political discord amongst the European Parliament and certain Member States. In the end, the draft legislation was not adopted and Commissioner Kroes' term as Commissioner came to an end.

The new Competition Commissioner, Joaquín Almunia, is thus far taking a different approach than his predecessor. While he advocates the concept of consumer actions, he appears to have put the draft legislation on hold. Instead, in May 2010, Commissioner Almunia announced that the European Commission would, in autumn 2010, launch a broad consultation on common principles for collective legal actions. He stated that such an approach is necessary to even begin considering proposals for antitrust-specific lawsuits, including class actions. He also indicated that non-litigious modes of consumer redress should be considered. As a result, the race towards legislation mandating an EU-wide class action mechanism has lost momentum. But the issue will undoubtedly remain alive in years to come.

Italy

Any loss of intensity concerning class actions at EU level is not mirrored in the Member States, where class actions are at the forefront of legal developments. This is underscored in Italy, where legislation enabling class actions took effect on 1 January 2010.

The Italian legislation differs from US-style class actions. In particular, Italy has adopted an opt-in system that enables consumers or consumer organisations to initiate litigation and allows others to opt in to the litigation. The final judgment is binding only on the opt-in class.

In the first five months of 2010, the new class action mechanism was put quickly to use. Four proceedings were initiated, three by the Italian consumer group, Codacons, and one by the consumer

organisation Adusbef. Three of the four class actions were brought against banks. All four cases are in the preliminary stages but uncertainty already exists as to the scope of the class action law and to procedural elements. It is expected that the Italian judiciary will play a major role in clarifying these issues so these first cases will be instructive as to the efficacy of the new class action system.

The speed with which Italy's new class action legislation has been adopted by consumer organisations suggests, however, that Italy could become an active venue for class action litigation.

“Germany could find itself a hub for pan-European class action litigation.”

Germany

Class action in Germany has evolved differently. No specific class action law exists in Germany, but plaintiffs are using novel means to effectively bring collective competition claims, including pan-European claims.

For example, a Belgian organisation known as Cartel Damages Claims SA (CDC) has been especially active. The organisation incorporates separate entities that exist to “purchase” claims from putative plaintiffs. A CDC entity then brings a lawsuit in German federal court, to date targeting companies subject to cartel decisions issued at national or EU level.

Thus far, in relation to the German cement cartel, CDC has succeeded before Germany's Federal Court of Justice in having the right to bring a claim on behalf of German claimants. No decision has been reached, however, as to whether CDC will succeed on the merits. Boldly, CDC brought a second case relating to a hydrogen peroxide cartel, in which it purports to sue on behalf of claims assigned to it by plaintiffs throughout the European Union. If CDC's claim is admissible, which issue is pending currently before the court, Germany could find

itself a hub for pan-European class action litigation, even in the absence of broad discovery or exemplary damages.

Conclusions

The landscape for class action litigation in the European Union at Member State level continues to evolve at an increasingly rapid pace. Companies must therefore be cognizant of these developments since their litigation exposure will increase proportionally (and dramatically) as class action litigation continues to take root in Europe.

Laura Lo Bello also contributed to this article.



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Information Sharing Under EU Competition Law: Handle with Care

By Frank Schoneveld and Francesco Savino

The exchange between companies of commercially sensitive information, such as prices, sales and other details of commercial strategies or conduct, could be regarded as a means to influence the conduct of competitors on the market. Indeed, the European Court of Justice (ECJ), in *Asnef-Equifax v Ausbanc* C-238/05, states that exchanges of information between companies will be incompatible with EU competition law “if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.”

Companies that share data with their competitors routinely must, therefore, be aware of the legal risks associated with such exchanges. Breaches of EU competition law can result in fines of up to 10 per cent of a company’s worldwide annual turnover. Moreover, a company or trade association may also be liable if it simply facilitates the exchange of information between third parties. In 2009, for example, the European Commission fined a small consultancy firm EUR 174,000 for having organised an information exchange in the context of a cartel in the plastics sector, despite the fact that the consultancy firm had never actually dealt in any of the products subject to the cartel.

There are two main criteria considered by the authorities in assessing the legality of information exchanges: (i) the structure of the market and (ii) the characteristics of

the information exchanged. Depending on the characteristics of the market in which companies are exchanging information, whether directly or through a facilitator such as a trade association, there is a real risk of competition law infringement when the information exchanged

- Concerns individual competitors’ prices, sales, volumes, capacity or conditions of supply that are not in the public domain.
- Can become commercially sensitive in combination with public information.
- Concerns a sector that would be commercially sensitive for a related/ another sector.
- Concerns future expectations.
- Covers a short period (*e.g.*, less than one month).
- Is exchanged frequently (*e.g.*, within less than a month of the last exchange).
- Is recent (*e.g.*, less than one year old).
- Is released only to competitors.

The Commission is currently undertaking a review of a proposed set of guidelines on the legality under EU competition law of information exchanges between competitors. The draft guidelines take into account the various contexts in which information exchanges between competitors take place and list a host of factors that will be considered when assessing information exchanges under EU competition law, including market coverage, market characteristics and the characteristics of the information exchanged.

The data exchanged between companies needs to be reviewed to ascertain whether it is sufficiently aggregated, and to what extent it can be disaggregated with information from other sources (including from publicly available databases). Moreover, if a new (actual or potential) competitor seeks access to data that is being shared within a consortium of companies, any refusal to grant access on the same terms as is enjoyed by the existing consortium members might also raise concerns under the competition rules.



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