



ANTITRUST MATTERS

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EDITORIAL

THE NOTION OF STATE AID AND COLLATERAL DAMAGE

Dear Readers,

Welcome to the July issue of DLA Piper's quarterly *Antitrust Matters newsletter*, which brings you antitrust and competition news from all around the world. Let's start with an editorial on developments in Brussels.

Whilst we reflect on the UK's decision to leave the European Union in a so-called **Brexit** referendum, it is fair to say that the impact on competition law (in such areas as legal privilege and substantive assessment of transactions with a UK link) will not materialise immediately. While the Brexit vote has stirred up significant debate among EU stakeholders there are no indications of an anti-UK bias so far.

In May 2016, the European Commission published the long-awaited **Commission Notice on the Notion of State Aid**. As a reminder for those outside Europe, the EU Treaty subjects all forms of national subsidies to particular businesses to prior approval, which can be obtained by individual authorisation at EU level or through a block exemption, a legislative document that specifies under which criteria subsidies are compliant with Single Market rules.

The new Notice summarises case law, but where no case law exists it gives guidance about the Commission's view, which can always be overruled by the EU courts in Luxembourg. The guidance is part of a plan to encourage public investment in the EU without distorting competition. Note that the Notice only says when a measure constitutes state aid. The question whether such state aid is compatible with the EU market is a different one that is ruled by other EU documents.

A few quick key highlights for our busy readers:

The Notice clarifies under which conditions public investment in the **construction of infrastructure** is free of state aid, putting an end to years of uncertainty following the 2012 *Leipzig-Halle* judgment of the EU Court of Justice. Note that public investments in purely local infrastructures that are unlikely to attract customers from other member states do not fall under EU state aid rules. As to the others, where infrastructure does not compete with other infrastructures of the same kind, public investment is deemed free of state aid. This is said to be the case for roads, railway infrastructure, inland waterways and water supply and wastewater networks. Don't ask for the logic, as a waterway may well compete with a railway. In contrast, when it comes to infrastructure energy, broadband, airport or port infrastructure, where infrastructures frequently compete, public investment is likely to amount to state aid and requires prior approval.

Different rules govern the question whether the **operation of an infrastructure** involve state aid. Whether or not an infrastructure is built with state aid, no state aid to the operator of that infrastructure is involved where the latter pays the market price (same principle applies to **users of an infrastructure**). The best way to ensure market price level is the organisation of a competitive, transparent, non-discriminatory and unconditional tender.

This leads us to an important novelty brought about by the Notice: the state aid rules are **more fully aligned with the public procurement rules**. Forward looking, compliance with public procurement rules excludes state aid not only in the case of fully competitive tenders, but also where other authorised public procurement procedures are used (e.g. negotiated procedure), as long as they involve publicity.

Another quite thorny issue is that of **fiscal state aid**. As most readers remember, the European Commission, the EU's competition watchdog, is currently prosecuting a number of member states for granting tax rulings to multinational companies that in the Commission's view amount to overly generous "sweet deals". Normally, jurisdiction for direct taxation has so far remained with the EU member states and not been given to the EU. However, the EU Court only recently confirmed in the Belgian Excess Profits Ruling that the state aid rules can also interfere with areas not yet harmonised at EU level. The Notice, not surprisingly, ensures that the Guidance is in line with the Commission's theory in those cases. Critical observers, including the undersigned, question not so much the EU's power to carry out these investigations, but the need to do so now, and the political wisdom of doing it.

While the whole theme has been somewhat fuelled by the *Luxleaks* attack targeted at destabilising European Commission President Jean-Claude Juncker, the fact remains that this exercise primarily targets **US-based multinationals**, which decided to bring investments to Europe and hoped they could rely on the tax rulings lawfully granted by the tax authorities of the member states concerned. What the EU officials have not yet realised is the amount of anger and irritation that this is causing overseas. At a time when the US Congress is trying to rework US international taxation rules, the EU investigations cause more than the usual concern in Washington, DC. It is admittedly difficult for the EU to backpedal, but if Brussels does not send out a strong, clear message now, trouble will continue to brew – as if we did not have enough to think about these days. Now that the EU is facing **Brexit**, it might be worth rethinking whether this is the right time to antagonise an important economic and strategic ally.



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SIGNALLING COLLUSION: GLOBAL TRENDS IN COMBATTING ANTI- COMPETITIVE INFORMATION DISCLOSURE



INTRODUCTION

Competition authorities have long grappled with the potential anti-competitive effects of pricing disclosures between competitors, or *price signalling* as it is commonly called. While some forms of pricing disclosures are legitimate and may be beneficial to consumers, other forms allow competitors to act collusively, leading to market inefficiencies that are ultimately borne by consumers.

Many jurisdictions, including the US, UK, EU and New Zealand, do not have specific price signalling provisions, and price signalling conduct is usually prosecuted under either generic prohibitions of anti-competitive agreements, or concerted practices prohibitions. In doing so, competition authorities worldwide have sought to stretch the cartel concept to regulate anti-competitive pricing disclosures.

Despite difficulties in accurately identifying and prosecuting anti-competitive price signalling, competition authorities continue to actively monitor and assess the impact of price disclosures; investigate and prosecute anti-competitive information disclosure and exchanges; and, where appropriate, seek undertakings from businesses to cease or alter their information sharing practices.¹

As competition authorities sharpen their focus on anti-competitive price signalling, it is increasingly important for businesses to understand how their conduct may be viewed under competition laws globally.

AUSTRALIA: EXPANDING THE SCOPE OF PROHIBITED SIGNALLING

Australian price signalling jurisprudence over the past decade is a ready reckoner of the challenges associated with prosecuting price signalling. Responding to the recommendations of a detailed competition policy review conducted in 2015, Australia's framework is set to transition over the coming year.

The current law in transition

To date, price signalling has been primarily considered under Australia's cartel provisions and under the general prohibition of anti-competitive arrangements and understandings.

However, since 2012, Australia has also had legislation that is specifically directed at the anti-competitive disclosure of pricing and other information in the

banking sector.² In particular, a division of the Australian *Competition and Consumer Act 2010* prohibits (in general terms):

- private price disclosures to competitors that are not in the ordinary course of business; and
- other forms of information disclosures (both public and private), such as disclosures about price, capacity or commercial strategy, where made for the purpose of substantially lessening competition in a market.

Australia's competition authority has published guidance regarding the kinds of conduct that would raise concerns under the price signalling division. For example, the guidance states that the division may apply where an employee of a bank discloses specific future pricing information to an employee of another bank at a social gathering, and may also cover instances where a banking executive announces to an industry event that the bank is prepared to follow rate or fee increases led by other banks.

¹ For example, the European Commission opened formal proceedings to investigate 15 container liner shipping companies in November 2013 in relation to the carriers' practice of publicising their future proposed freight price increases on websites and via the press. In February this year, the Commission sought feedback on commitments offered by the carriers to address concerns that the public disclosures may allow competitors to assess each other's pricing plans and to coordinate their behaviour in breach of Article 101 of the TFEU.

² Division 1A of Part IV, *Australian Competition and Consumer Act 2010*.



Nonetheless, no cases have been brought under the specific price signalling provisions since their introduction and there is now a proposal to repeal the provisions. The 2015 competition policy review in Australia recommended that the price signalling provisions be repealed on the basis that they are not fit for purpose, including because the prohibition on public disclosure of prices may over-capture pro-competitive or benign conduct.

The review recommended, however, that a new prohibition on concerted practices that substantially lessen competition should instead be introduced (based on the concerted practices prohibition in Europe) to address concerns about anti-competitive price disclosure in Australia. This proposal is intended to address concerns voiced by Australia's competition authority about the ineffective regulation of price signalling conduct generally, based on difficulties the competition authority has faced in establishing that a practice of price information exchange amounts to a prohibited "understanding" under the current law.

The Australian government has signalled that it will draft legislation this year that incorporates the proposed new concerted practices prohibition and repeals the current price signalling provisions. Although the precise details of the proposed new law are not clear, the competition policy review indicated that a concerted practice would

cover "a regular and deliberate activity undertaken by two or more firms", and noted that it would "include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange".³

Cases

As outlined above, Australia's specific price signalling provisions only apply to the banking sector, and no cases have been brought under those provisions. Instead, the key price signalling cases in Australia have involved the petrol industry, and have been considered under Australia's cartel provisions or the general prohibition on anti-competitive arrangements and understandings. These cases demonstrate the difficulties that Australia's competition authority has faced in prosecuting price signalling conduct.

For example, the case of *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161 (*Apco*) shows that a practice of accepting competitors' pricing information may not amount to a prohibited understanding under Australia's anti-competitive agreements prohibition. In *Apco*, a petrol retailer successfully appealed a Federal Court decision which had held that the retailer was party to an illegal understanding to fix the retail price of petrol. The alleged price fixing conduct involved rival

petrol stations making and/or receiving 'price-increase calls' in order to set the timing of price increases to petrol at the pump.

On appeal, the Full Court considered that although the retailer knew that the purpose of the calls was to persuade or induce price conformity, the retailer did not always respond by increasing prices in the same uniform and timely manner as other petrol retailers. The Full Court went on to conclude that the retailer had never *committed* to the understanding and was therefore not a party to it.

This requisite level of "commitment", necessary to prove an anti-competitive agreement or "understanding" under Australian law, means that some forms of anti-competitive price signalling may not be caught by the current provisions.

More recently, another matter involving an alleged form of price signalling among petrol retailers conducted through a subscription to a web-based information service was settled by Australia's competition authority without formal prosecution. In this matter, most of the retailers involved settled on a basis that allowed them to continue using the information service in the same way, provided the information received through the service is made available to consumers and third-party

³ Harper et al, *Competition Policy Review, Final Report*, March 2015, p. 370.



organisations at the same time. However, two of the retailers settled on more restrictive terms, agreeing that they would not subscribe to the service or any similar services for five years.

The cases in Australia highlight the difficulties associated with prosecuting price signalling conduct, but also show that Australia's competition authority is prepared to investigate and prosecute information exchanges where it considers there may be an anti-competitive effect.

THE EUROPEAN UNION

A competition problem could arise with regard to the unilateral public announcement of future prices or of conceivably sensitive information. Communicating such factors as prices or volumes to customers also forms an essential part of competition and is day-to-day practice for many companies. However, since competition authorities are stretching the boundaries of competition law, these unilateral price communications could potentially amount to a concerted practice, since the communicated information may also be noted by competitors, who take it into account when determining their own commercial conduct.

Nonetheless, the EU's 2011 Horizontal Guidelines show that in a case of price signalling, finding a competition law infringement is highly dependent on the facts.⁴ The guidelines state: "Where a company makes a

unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because of strategic responses of competitors to each other's public announcements."

Unfortunately, due to the scarcity of case law on price signalling, the conditions under which price signalling becomes a punishable anti-competitive practice are still unclear. This scarcity can be explained, since most companies subject to a price signalling investigation have opted for behavioural commitment decisions, rather than risking an often significant fine.

A recent example is the container liner shipping investigation by the European Commission. The 15 container liner shipping companies under investigation offered commitments in order to address the European Commission's concerns relating to concerted practices through price signalling. The European Commission has concerns that the container liner shipping companies' practice of publishing their future intentions to increase their prices may harm competition. Although the container liner shipping

companies have not admitted to any anti-competitive behaviour, they agreed to offer binding commitments to settle the European Commission's investigation.

These announcements, known as General Rate Increases or GRI announcements only indicated the increase in US dollars per transported container unit (as an amount or percentage of the change), the affected trade route and the planned date of implementation. The GRI announcements were generally made three to five weeks before their implementation, and during that period other container liner shipping companies would announce similar increases.

The European Commission's concern was that the GRI announcements might not provide full information on the new prices to customers, but merely allowed them to explore each other's pricing intentions and subsequently coordinate their behaviour.

To address the European Commission's concerns, the container liner shipping companies offered to stop publishing the GRI announcements in their then-current form. In order for customers to be able to understand and rely on their price announcements, the announcements will become more transparent and will include at least the five main elements of the total price (i.e. the base rate, bunker charges, security charges, terminal handling charges and peak season charges, if applicable). Furthermore any future announcement

⁴ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, point 63.



shall be binding on the carriers as a maximum price and will not be made more than 31 days before its entry into force.

The commitments will be made legally binding by the European Commission and would apply for three years. However, there are two exceptions. The commitments would not apply to communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers, and to communications made during bilateral negotiations or communications tailored to the needs of a specifically identified purchaser.

If a company breaks one of the agreed commitments, the European Commission can impose a fine of up to 10 percent of the company's worldwide turnover, without having to find a competition law infringement.

ITALY

The Italian Competition Authority (ICA) has dealt with price signalling a few times.

In *Case Compagnie Aeree – Fuel Charge*⁵, the ICA looked at an airline company's publication on its website of two press releases. The first press release communicated the introduction of a new fuel surcharge

and the second one communicated the raise of the surcharge. The ICA found that following the publication of these press releases, other competing airlines applied, and then increased, the identical surcharges. The ICA deemed this behavior to be a concerted practice in violation of competition law.

*Prezzi dei Carburanti in Rete*⁶ concerned price signalling practices regarding oil market prices. The case concluded with the ICA's acceptance of the commitments proposed by the oil companies involved. In its decision to open the proceedings, the ICA deemed that an exchange of information between competitors regarding prices – carried out by publishing press releases and fuel price lists in industry magazines – likely facilitated price collusion between the competing companies. Among the commitment the involved oil companies made was to cease communicating price lists to the press.

In *Listino Prezzi della Pasta*⁷, the ICA sanctioned a cartel made up of the members of an association of pasta producers, who were coordinating their price increases via press releases, press conferences, newspapers and television interviews. The ICA ascertained that an association of small and medium sized companies active in the food sector was also following the same practice.

THE NETHERLANDS

In January 2014, the Netherlands Authority for Consumers and Markets (the ACM) ended an investigation into mobile telephony operators KPN, Vodafone and T-mobile with a commitment decision.⁸ During its investigation, the ACM had identified anti-competitive risks of public statements made by the operators about possible future changes to their commercial terms. These statements included media reports, speeches, presentations and contributions to panel discussions at conferences, as well as interviews through both traditional and digital media.

By way of example, the AMC mentioned a statement made by a representative of one of the mobile operators at a conference that is considered the most important telecom event in the Netherlands. This representative publicly announced that his company was considering to reintroduce separate connection fees (payable by customers who conclude a new contract). The ACM found internal documents of the other mobile operators, showing that they had taken note of the announcement. The ACM considers it a risk to competition if companies take note of (and may follow) public statements of their competitors about intended future changes to their commercial policies, as this can lead to a collusive market outcome which is harmful to consumers.

⁵ Decision n. 11038 dated 1 August 2002, Case 1446 – *Compagnie Aeree – Fuel Charge*.

⁶ Decision n. 17754 dated 20 December 2007, 1681 – *Prezzi dei Carburanti in Rete*.

⁷ Decision n. 19562 dated 25 February 2009, Case 1694 – *Listino Prezzi della Pasta*.

⁸ ACM decision of January 7, 2014, case number 13.0612.53. See also the press release at <https://www.acm.nl/en/publications/publication/14326/Commitment-decision-regarding-mobile-operators/>.



The three mobile operators therefore made a commitment to the ACM to refrain from making any statements in public about intended changes to their commercial policies that may be unbeneficial to consumers, at a time when the internal decision to adopt the change has not yet been finally made. They also promised to incorporate this commitment into their compliance programs and to give the matter special attention in employee training workshops.

The ACM declared the commitments binding on the mobile operators, which risk being fined if they do not act in accordance. Due to the nature of a commitment decision under Dutch competition law, the ACM did not have the opportunity to formally decide that the public announcements at issue did actually violate the cartel prohibition. However, the statement of reasons for the decision leaves little doubt about the ACM's conviction that public announcements in circumstance such as those in the case at hand may well be within that prohibition's scope.

ROMANIA

The Romanian Competition Council (RCC) analysed price signalling practices in a decision issued in 2009, following an investigation of the market for driving school services in Bucharest. The RCC fined 32 economic operators (31 driving schools and one individual driving instructor) for participating in a cartel aimed at fixing prices for driving school services.

The base level of the fine was set at 6 percent of the turnover achieved by the undertakings in the year prior to the sanctioning decision.

The decision is relevant as it was the first time that the RCC looked at price signalling practices, although no comprehensive assessment of the practices was performed.

Pursuant to the investigation, the RCC found that representatives of multiple driving schools participated in several meetings organised during June 2007 – January 2008 by the driving schools' trade association, whereby they repeatedly discussed the application of a uniform policy related to driving school fees, demonstrating a joint intent to coordinate price-related conduct.

In the RCC's view, the cartel was in fact established at a meeting on January 31, 2008. On that occasion the participants agreed to increase driving school fees as of February 1, 2008 and to set a minimum fee for driving school services.

The establishment of the agreement was demonstrated by the RCC based on minutes of the meeting that took place at the offices of the trade association, corroborated with other documents seized during dawn raids performed by the RCC as well as with statements of the individuals involved.

The RCC also established a connection with a TV announcement made by one of the cartelists during a popular newscast on January 15, 2008 (*i.e.*, before the actual anti-competitive agreement was put into place). The announcement informed about the intention of one of the driving schools to increase fees as of February 1, 2008. This was interpreted by the RCC as representing a signal to the other driving schools to also increase fees, such media coverage actually facilitating the coverage of a substantial proportion of the market by the contemplated cartel.

According to the RCC, by ensuring media coverage of the contemplated increase in driving school fees, the cartelists succeeded in coordinating their competitive conduct on the market. The RCC took the view that the cartel had a significant dispersed effect, in that it was sufficiently influential as to induce in those economic operators active on the market that were not part of the agreement the tendency to similarly increasing their tariffs to at least the same level.

However, the RCC did not assess price signalling as such, but rather in correlation with other evidence. Although price signalling was not found to directly lead to the establishment of the cartel, it was nevertheless sanctioned as part of the elements defining the cartel. The company whose representative made the TV announcement was one of four sanctioned as ringleaders of the cartel, The RCC also included in the sanctioning decision a monitoring obligation, whereby the cartelists



had to submit to the RCC any changes in their fee policies for a period of two years after the issuance of the decision.

THE UNITED STATES OF AMERICA

Section 1 of the Sherman Antitrust Act provides:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

Contrary to the EU position, which prohibits concerted practices even in the absence of the parties’ *commitment* to act in concert, US jurisprudence in relation to section 1 of the Sherman Act requires “a conscious commitment to a common scheme designed to achieve an unlawful objective.”⁹

The US position is therefore narrower than the EU’s concerted practices prohibition; mere receipt of information from a competitor will not impugn the

receiver under section 1 in the absence of a “meeting of minds”¹⁰ to conspire. Accordingly, US courts have held that signalling future prices is lawful as long as it serves a legitimate, procompetitive purpose, such as customer necessity.¹¹ Additionally, participants in oligopolistic markets may engage in parallel pricing, so long as they do not collude. In 2015, two circuit courts found that the defendants’ conscious parallelism in raising prices did not violate the antitrust laws. Indeed, in oligopolistic markets, “a single firm’s change in output or price ‘will have a noticeable impact on the market and on its rivals.’”¹² Thus, “the theory of interdependence posits that ‘any rational decision [by an oligopolist] must take into account the anticipated reaction of the other firms.’”¹³ Such parallel pricing, in the absence of collusion, is legal because (1) conscious parallelism “is not an agreement[;] instead, it can be a necessary fact of life in oligopolies,”¹⁴ and (2) it is considered lawful “because courts have no effective remedy for the problem.”¹⁵ In other words, when participants in an oligopolistic market engage in conscious parallelism pricing, this

“may be not because they’ve agreed not to compete but because all of them have determined independently that they may be better off with a higher price.”¹⁶

However, as outlined in our previous edition of *Antitrust Matters*, regulators and courts may find evidence of unlawful behavior in regard to the publication of tentative prices.¹⁷ For example, in the early 1990s, the US Department of Justice sued several airlines and an airline tariff publishing company in relation to the alleged exchange of proposed pricing changes through the tariff publishing company.¹⁸ The DOJ indicated that section 1 of the Sherman Act may be used as a basis to take action against certain price signalling conduct. In addition to viewing the publication of tentative prices as problematic, the courts seek to determine whether the information disclosed is useful to market participants. For instance, the Ninth Circuit found that the plaintiffs had presented permissible inferences of a “meeting of the minds” to coordinate pricing through press releases and postings of prices in a case involving

⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

¹⁰ *Am. Tobacco Co. v. United States* 328, U.S. 781, 810 (1946).

¹¹ See e.g., *Reserve Supply Corp. v. Owens-Corning Fibreglass Corp.*, 971 F.2d 37, 54 (7th Cir. 1992).

¹² *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 397 (3rd Cir. 2015) (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3rd Cir. 2004)).

¹³ *Id.*

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ *Id.* at 397-98.

¹⁶ *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 871 (7th Cir. 2015). See also *Valspar Corp. v. E.I. Du Pont De Nemours*, 2016 WL 304404 (D. Del. Jan. 25, 2016).

¹⁷ See e.g., *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-48 (3rd Cir. 2004).

¹⁸ *United States v Airline Tariff Publishing Co.*, 59 Fed. Reg. 15,225, 15,230 (Mar. 31, 1994).



oil companies allegedly sharing price information to raise or stabilize prices.¹⁹ The court indicated that the publication of prices lacked legitimate business reasons, were of significance only to the oil companies and their franchised dealers and to no other market participant, and contained details the disclosure of which might be considered against self-interest.²⁰ Thus, US case law seems to push the boundaries delimiting when a “meeting of minds” will be found; the courts have shown a greater willingness to *infer* the presence of an agreement than, for instance, their Australian counterparts.

The FTC sought to use section 5 of the FTC Act prohibiting the use of unfair methods of competition in commerce to intervene in price signalling cases where the violations did not fall within the scope of the Sherman Act.²¹ In *Ethyl Corp.*,²² the Second Circuit set aside an FTC final order, which had found that although the defendants had not colluded in the antiknock gasoline additives market, they had nonetheless violated section 5 of the FTC Act by adopting the same contractual standards, including price signalling and pre-signalling (where the contract requires a 30-day

notice of a change in price but the parties give notice earlier than the required 30-days). Finding that “the FTC’s rulings and order appear to represent uncertain guesswork rather than workable rules of law,”²³ the Second Circuit ruled that certain minimum requirements were necessary before finding a violation of section 5 of the FTC Act. Indeed, absent a tacit agreement, “at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.”²⁴

In the healthcare sector, the DOJ and the Federal Trade Commission issued a joint statement creating safety zones for price or personnel-related cost surveys, according to which those agencies would not challenge the exchange of such information absent extraordinary circumstances. To fall within the ambit of the safety zones, the following requirements must be met: (i) “the survey is managed by a third-party (e.g. a purchaser, government agency, health care consultant, academic institution, or trade association)”; (ii) “the information provided by survey participants is based on data



¹⁹ *In re coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 445-450 (9th Cir. 1990).

²⁰ *Id.*

²¹ 15 U.S.C. § 45.

²² *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2nd Cir. 1984).

²³ *Id.*, at 139. “[W]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is ‘unfair’ within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition.” *Id.*, at 138.

²⁴ *Id.*, at 139.



more than three months old”; and (iii) “there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.”²⁵ Similar safety zones have been applied in other industries as well.²⁶

CONCLUSION

International best practice

In order to avoid the scrutiny of competition authorities around the world, caution is advisable when making both public and private disclosures regarding your company’s future prices or strategy.

Although many forms of information disclosure may be legitimate, and can be beneficial to consumers and competition, businesses should be mindful of the relevant laws in their jurisdiction and the risks that

certain information disclosure may be viewed as anti-competitive. General best practice tips that may help to reduce such risks are:

- Do not directly share information about matters such as price, quantities or business strategy with competitors. Seek legal advice if you think there may be legitimate reasons for any disclosures to competitors (e.g., in the context of a joint venture or vertical supply arrangement).
- If making public announcements regarding future prices:
 - make sure that they are genuinely public, in the interests of customers and are unequivocal (not tentative or subject to what your competitors do);
 - consider whether the announcement could be construed as an “invitation to collude”; and
 - only disclose information that is necessary to be communicated to customers and do not direct the announcement to (or include references to) specific competitors.²⁷

- Be mindful that your business may breach competition laws without expressly *committing* to exchange information, or to use information that has been disclosed to you by your competitors.
- If a competitor discloses information to you about matters such as future pricing or strategy, publicly distance yourself from the discussion (and quarantine any written information). Seek urgent legal advice to further guide your response.

²⁵ DOJ and FTC, *Statement on Provider Participation in Exchanges of Price and Cost Information (Statement 6)* (Aug. 1996).

²⁶ For ground transportation, see DOJ Bus. Review Letter to Am. Trucking Ass’n, 2002 DOJBRL LEXIS 11 (Nov. 15, 2002) (allowing for a national trucking association to circulate a model contract to its members to be used on a voluntary basis, either in whole or in part, and lacking any reference to price, rates or charges). For consumer telecommunications, see DOJ Bus. Review Letter to National Consumer Telecommunications Data Exchange, 2002 DOJBRL LEXIS 1 (Mar. 12, 2002) (allowing for an expansion of credit information exchange to other utility industries).

²⁷ See OECD Policy Roundtable, *Unilateral Disclosure of Information with Anticompetitive Effects* 2012.



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SPECIAL REPORT: EASTERN EUROPE GETS SERIOUS ON BID RIGGING

POLAND

THE POLISH COMPETITION AUTHORITY CONTINUES TO PURSUE BID-RIGGING CASES

According to an announcement on its official website, the Polish Competition Authority (PCA) has issued eight decisions concerning bid-rigging cases since 2015. Another 34 proceedings are pending. This clearly demonstrates two things: that the national competition watchdog is very active in the public procurement market in Poland, and that many of the companies participating in tenders are not aware of the risks related to competition law. With large numbers of tenders announced every year, the PCA will certainly continue to closely monitor this part of the market. What is more, it tends to cooperate closely with contracting authorities with a view to raising their vigilance in competition law matters.

The most common scenario that comes under the scrutiny of the PCA is where companies are accused of engaging in so-called bid rotation schemes. This happens when their offers are ranked first and second and the company with the most advantageous offer either pulls out or does not rectify the formal defects of its offer (e.g., fails to provide required documentation) in order to make it possible for the contracting authority to choose the second offer. The PCA usually examines

if there are any business or family relations between the bidders, as it considers these as factors that facilitate collusion in tenders.

However, the PCA does not limit its activities in the public procurement market to bid rotation schemes. The most widely debated topic at the moment is the permissible scope of cooperation between bidders – in particular competitors – in the form of consortia. Such cooperation is more frequent in larger procurements, such as infrastructure or construction projects. By its very nature, such cooperation involves the exchange of information about resources, capabilities, and prices of certain types of work, and therefore raises significant competition law issues, especially in the case of consortia formed by competitors.

With the PCA paying particular attention to the public procurement market, it is essential for bidding companies to be aware of competition law-related risks. They should bear in mind that compliance with the rules governing public procurement procedures does not guarantee immunity from competition law and possible fines. Any action that may influence the final result of a tender – such as a refusal to sign the contract or the decision about whom to form a consortium with – should be a part of every bidding company's competition law screening.



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ROMANIA

ROMANIAN COMPETITION COUNCIL ISSUES GUIDANCE FOR COMPANIES PARTICIPATING IN PUBLIC TENDERS

In May 2016 the Romanian Competition Council (RCC) published a set of guidelines dealing with the competition risks triggered in the context of public procurement procedures.

The RCC invited the stakeholders to express their opinion on the draft Guide for observing the competition rules when tendering as part of consortium in public acquisition procedures (the Consortium Guide). Separately, the RCC published a Guide for the detection and discouragement of anticompetitive practices in public procurement procedures (the Bid Rigging Guide) which is addressed to contracting authorities.

Both guides have been published in the context of the entering into force on 26 May 2016 of the legislation package transposing the EU directives package on public procurement.

The Consortium Guide includes guidelines and recommendations for companies that want to form a consortium to tender for a public contract:

- Brief assessment of the consortia that in principle do not breach competition law:
 - the consortium members **are not actual or potential competitors** (subject to the limitations triggered by potential facilitation of unlawful exchanges of information)

- the consortium members form part of a **single economic entity**
- the consortium members are competitors **but the following conditions are cumulatively met:**
 - (i) none of the parties to the consortium bid could fulfill the tender requirements on its own; and (ii) no subset of the consortium members could together fulfill such requirement; and (iii) only the minimum amount of information strictly necessary for the preparation of the bid or performance of the contract are exchanged between the consortium members; and (iv) the consortium members ensure that they compete vigorously as normal in all other contexts
- The consortia that do not meet the conditions above should perform a self-assessment.

In addition to the guidelines for the assessment of the potential competition risks triggered by the participation to a public procurement in consortia, the Consortium Guide includes a Q&A tree, sample hypothetical case studies, as well as recommendation of the steps to reduce the risk that a consortium bid breaches competition law and the steps to be taken should there be any indication of competition law breaches.

The Bid Rigging Guide also includes practical case studies that were previously addressed by the RCC. The Bid Rigging Guide is in line with the OECD Recommendation on Fighting Bid Rigging in Public Procurement.

The public consultation for the Consortium Guide ended on May 31, 2016; it is expected that the RCC will soon publish an updated final version taking any comments into consideration.

Companies should take into account the guides published by the RCC, together with EU Public Procurement Legislation, since these could impact them, especially those active in sectors that usually deal with public procurement procedures. In addition, the RCC maintains a focus on bid rigging practices in various industries.



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SLOVAKIA

SLOVAK COMPETITION AUTHORITY HAS NEW POWERS ON SANCTIONING BID RIGGING

The latest amendment of the Act on Protection of Competition widens the powers of the Slovak Competition Authority (*Protimonopolný úrad Slovenskej republiky*) while punishing any coordination of undertakings in a public procurement, public tender or other similar collusive tendering (bid rigging). Bid rigging practices may have many forms that can significantly affect the purpose and goals of public procurement.

Under Slovak law, the Authority is entitled to impose fines of up to 10 percent of turnover for the violation of the prohibition of any agreement restricting competition, such as bid rigging cartels.

Bid rigging conspiracies will however not only be punished by the Authority with a fine but also with a **ban on participation in public procurement**:

- The Authority will prohibit the undertaking from participating in a public procurement for a period of **three years** if it also imposes a fine for a bid rigging cartel. The only exception is the case where the Authority reduced the fine due to leniency program.
- A significantly shorter ban on participation in a public procurement for **one year** will be imposed to the undertaking in case the imposed fine for bid rigging has been reduced as a result of a settlement with the Authority. Within the settlement proceeding, the undertaking shall admit participating in a violation and

accept liability for such participation. Further, the Office shall reduce the fine that would be imposed otherwise. However, there is no legal claim for the settlement.

The Amendment became effective as of April 18, 2016, although the ban can also be imposed in cases where the imposing penalty concerns a bid rigging cartel that occurred even before the Amendment came into effect. As a result, any undertakings that are already being investigated by the Authority may eventually be prohibited from participating in a public procurement as well.

In case of breaching the ban on the participation in a public procurement, a fine will be imposed on the undertaking of **up to 10 percent of its turnover**.

The Authority cooperates with the Public Procurement Office (*Úrad pre verejné obstarávanie*) in order to reveal bid rigging cartels. It also secures that the final decision on the ban is delivered timely to the Public Procurement Office so that it can take related steps (e.g. disqualify such undertaking from its respective register).

Within the priorities set out by the Authority, bid rigging is considered a serious offence (a hardcore cartel) deforming the public procurement proceedings and having a negative impact on the business environment. Due to this recent development in Slovakia, we can expect that the Authority will now focus on public procurement and similar proceedings in order to punish bid rigging tendencies and cartels.

The risks and consequences of investigations of possible bid rigging cartels are substantial. Such an investigation can be very disturbing for the undertakings and its

employees and may result in various information and other obligations in relation to the Authority, as well as significant costs.

In the light of this, if you suspect that bid rigging is occurring, be sure to consult with your legal counsel first and consider whether it is appropriate to proceed with the bid. In order to prevent and mitigate the larger risk of investigation, consider implementing internal compliance regulations and schooling programs for employees.



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GLOBAL UPDATES





EUROPEAN UNION

COMPETITION LAW, BIG DATA AND DATA PROTECTION – ARE COMPETITION AUTHORITIES BECOMING JACKS OF ALL TRADES?

INTRODUCTION

The French and German competition authorities have jointly published a paper on big data and competition law. The paper gives an overview of the issues and analyses the implications and challenges that the regulators face because of data collection and the subsequent use of that data in the digital economy and various other industries. The French Autorité de la concurrence started a sector inquiry into digital-market data on May 23, 2016, while the German Bundeskartellamt opened an investigation into Facebook over its contract terms for using consumer data. The Bundeskartellamt said that it suspects Facebook of breaching data protection rules by imposing unclear and unfair terms of service.

This raises questions on whether competition authorities will solely look into big data as it might lead to harm to competition, or whether competition authorities will also use competition law enforcement to prevent violations of data protection laws. Are there possible synergies in the enforcement of competition law and data protection laws? Further, one could ask whether competition authorities are competent and best placed to decide on potential violations of data protection laws.

THE IMPACT ON COMPETITION LAW ENFORCEMENT

The collection and use of great volumes of data are mechanisms by which products and services are improved and economic efficiency is raised. However, big data may indeed raise competition concerns in some cases. The collection and use of big data may raise entry barriers and can be a source of market power. Furthermore, it can also reinforce market transparency and thus facilitate collusion. But does this allow competition authorities to scrutinise the data protection policies of undertakings?

In Germany, the Bundeskartellamt said that it was examining whether Facebook's terms of service violated competition law and data protection laws by requiring users to give up their personal data. However, data protection concerns by themselves are not within the field of competence of competition authorities. In Case C-238/05, *Asnef-Equifax*, the European Court of Justice held that any issues relating to the sensitivity of personal data are not, as such, a matter for competition law, but may be resolved on the basis of the relevant provisions governing data protection. This was confirmed by the European Commission in Case M.4731, *Google/DoubleClick* and Case M.7217, *Facebook/Whatsapp*. In that latter case, the Commission stated that any privacy related concerns that would arise due to the increased concentration of data within Facebook's control as a

result of the merger do not fall within the scope of EU competition law but within the scope of the EC data protection rules.

However, the above does not mean that competition law is completely irrelevant to personal data and data protection. Statutory requirements deriving from other bodies of law may always be taken into account when conducting a legal analysis for competition law purposes, if only as a contextual element. For instance, in case C-32/11, *Allianz Hungária*, the ECJ held that the violation of another set of national rules could be taken into account to assess whether there was a restriction of competition. On a national level, the German Federal Court of Justice has stated in Case KZR 61/11, *VBL-Gegenwert*, that contract terms which are incompatible with general contract law might constitute an abuse of a dominant position.

Reference could also be made to how the European Commission takes cultural diversity into account. The Treaty on the Functioning of the European Union (TFEU) states that “the Union shall take cultural aspects into account in its actions under other provisions of the Treaties, in particular in order to respect and promote the diversity of its cultures” (see Article 167(4) TFEU). The European Commission has expressly taken cultural diversity into account in Case M.6458, *Universal Music Group/EMI Music*.



Although there is no specific Treaty article that requires the Commission to take into account data protection, Article 16 TFEU, a provision that has general application, states that “everyone has the right to the protection of personal data”. This article, when read in conjunction with Article 7 TFEU that places an obligation on the Commission (and other EU Institutions) to ensure consistency between policies, obliges the European Commission to take into account data protection concerns. Therefore, there is scope to argue that competition law should be applied alongside data protection law to enhance the effectiveness of the EU data protection rules. Furthermore, the EU Institutions are obliged to respect the rights as set out in the EU Charter of Fundamental Rights (ECFR) and promote their application. Article 8 of the ECFR includes the right to data protection; thus, the European Commission is in fact obliged to respect and promote the right to data protection. In 2014, the European Data Protection Supervisor advocated for a policy shift and a more holistic approach to enforcement. The European Data Protection Supervisor also pleaded for more dialogue between competition, consumer and data protection authorities in cases where consumer welfare and/or data protection issues arise.

Especially in the context of merger control, data protection can be very relevant from a competition standpoint. If an undertaking gains a powerful position through a merger, it may be capable of gaining further market power through obtaining greater amounts of customer data and further deteriorating the protection of the consumers’ privacy. Also with respect to Article 102 TFEU, the deterioration of data protection could become a problematic issue, especially if a

powerful market player intentionally breaches data protection laws, and if there is a strong link between that undertaking’s market position and the collection of data.

However, the above described issues remain competition issues rather than data protection issues, and in a speech on 17 January 2016, Commissioner Margrethe Vestager stated that “she does not think the Commission needs to look to competition enforcement to fix privacy problems.” However, the Commissioner stressed that this does not mean that the European Commission will ignore genuine competition issues just because they have a link to data.

CALL TO ACTION

So although data protection law and competition law serve different goals, data protection issues should not be excluded from a competition law analysis simply on the basis of their nature. Actions of undertakings regarding the collection and use of personal data can have implications for the competition on the market. Therefore, competition authorities are likely to take privacy policies into account whenever these policies are liable to affect competition, in particular in abuse of dominance investigations into undertakings for which data serves as a main input of its products or services.

However, as Commissioner Vestager indicated during her speech at the DLD conference in Munich last January, DG COMP’s focus will be on genuine competition issues, and not on data protection issues as such. But, it sticks out like a sore thumb that competition authorities will take big data into account as an indication of market power. This will especially be relevant in merger cases and abuse of dominance investigations.



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FIRST AID FOR A DAWN RAID

A dawn raid is an unannounced – and most often unexpected – inspection by a competition authority, during which the authority will look for evidence of a suspected competition law infringement. These inspections can take place at the undertaking's premises, but also – more rarely – at private premises of employees, such as homes and cars, if this is approved by a judge. However, for inspections of non-business premises there must be a reasonable suspicion that books or other records relevant to the inspection are being kept there.

Pursuant to Article 20(2) of Regulation 1/2003 the Commission officials are empowered to (i) enter any premises, land and means of transport of undertakings and associations of undertakings; (ii) examine the books and other records related to the business, irrespective of the medium on which they are stored; (iii) take or obtain in any form copies of or extracts from such books or records; (iv) seal any business premises, books or records for the period and to the extent necessary for the inspection; and (v) ask any representative or member of staff of the undertaking, or association of undertakings, for the explanation on facts or documents relating to the subject matter of the inspection and to record the answers.

More recently, the Commission updated its explanatory note on dawn raids in order to provide more clarity on its powers of inspection. These updates mainly focused on the Commission's powers of inspection

regarding undertakings' IT environments, as the former guidance document did not reflect the new technological developments.

Inspections by the European Commission are usually conducted pursuant to a formal decision, and they will usually be assisted by the competent national competition authority in whose jurisdiction the European Commission is conducting the dawn raid. This is because the national competition authority has the competence to request police assistance. As a result, when the European Commission comes knocking on your door, its representatives will usually be assisted by the national competition authority, who, in its turn, will be assisted by the national police forces.

Undertakings that are subject to a dawn raid have many obligations, and failing to comply with those obligations can lead to significant fines. Therefore, it is vital that every single employee knows what his or her obligations and duties are during the dawn raid. The presence of properly trained employees who know how to act during a dawn raid can make an enormous difference.

The reception staff are usually the first personnel to encounter the authority. It is very important that they follow the internal response strategy that outlines the key initial steps that they have to undertake. Such steps include requesting, copying and checking the inspection team's authorisation, initiating the internal response mechanisms, and contacting the external lawyers.

Because the Commission's inspection team is most likely not willing to postpone its inspection until the external lawyers have arrived, a senior member of the internal response team should take the lead in coordinating the dawn raid from the perspective of the raided undertaking. The internal response team leader should review the scope of the Commission's authorisation document and make sure that every inspector is being shadowed and that all employees cooperate with the Commission's requests. It is important to understand that the inspectors should not encounter delaying tactics.

Cooperation is of paramount importance. An undertaking that is subject to a dawn raid has the duty to cooperate, and competition authorities all over Europe, including the European Commission, are becoming increasingly tough on undertakings that fail and/or refuse to cooperate during an inspection. For example, E.ON was fined €38 million by the European Commission for breaching a seal, and the Spanish authority fined a company for €2 million for delaying the start of an inspection for 55 minutes.

Once the external lawyers have arrived, an experienced senior lawyer/partner will take over the role of the team leader. The team leader will allocate the various tasks, coordinate the dawn raid support, and double-check the scope of the Commission's authorisation documents. Particular attention should be paid to the document review by the Commission officials, the interrogations of employees, legal privilege and the use of seals.



For example, during a document review it is very important that a record is kept of all documents the Commission officials have copied and/or searched, and that all interrogated employees are properly assisted by in-house or external lawyers.

Once the Commission has terminated its inspection, it will produce a record of minutes of the inspection. It is of the utmost importance that these minutes are thoroughly checked before they are signed (please note

that you cannot refuse to sign the minutes). The minutes should be completely accurate and should reflect all incidents from the inspection. This is very important as this will be the departure point for further analysis and strategic decisions in the overall investigation.

The above text merely describes a few of the key aspects that should be kept in mind when an undertaking is subject to a dawn raid. Proper dawn raid training of employees, the existence of an internal response team,

and the presence of and guidance from external lawyers are essential to bringing a dawn raid to a good end. All DLA Piper lawyers are trained to effectively handle dawn raid situations. Further, DLA Piper has many senior lawyers with extensive dawn raid experience, as well as offices across the globe. This puts us in a position to provide high-quality dawn raid assistance, even when multiple business premises are being inspected.



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CHINESE SOES WILL FACE GREATER SCRUTINY IN EU MERGER REVIEWS

INTRODUCTION

The European Commission has cleared a joint venture between Electricité de France S.A. (EDF) and China General Nuclear Power Corporation (CGN) (Case M.7850). The JV was cleared without conditions, but the transaction raised an important jurisdictional issue: the treatment of state-owned enterprises (SOE) under the EU Merger Regulation. The question is whether for turnover calculation purposes the SOE should be treated like an autonomous entity or whether it is dependent on the State and linked with other SOEs.

In the case at hand, the Commission ruled that CGN, which on a stand-alone basis did not meet the EU thresholds, was not independent from China's State-owned Asset Supervision and Administration Commission (SASAC). As a result, the Commission took the combined revenue of all Chinese state-owned enterprises active in the energy sector into account to determine whether it had jurisdiction to scrutinise the concentration. While the decision is limited to the facts of the case at hand, the underlying methodology will be applied in future cases.

In general, the European Commission only reviews concentrations if each of at least two parties exceeds certain global and EU turnover thresholds. While CGN, on its own, did not meet the relevant threshold,

the concentration had to be notified because the Chinese energy SOEs, taken together, exceeded the EU jurisdictional thresholds.

The test ordinarily used is straightforward: For the calculation of turnover, an SOE will be considered on a stand-alone basis (i) where it can decide independently on its strategy, business plan and budget; provided (ii) that the state does not have the possibility to facilitating coordination among SOEs in the same industry.

The notifying parties advanced a number of constitutional arguments to establish the independence of CGN from SASAC. The 2008 PRC law on SOEs clearly establishes (i) a separation between government and business functions, (ii) it only gives SASAC limited powers of removal of management, and (iii) it implements a confidentiality policy that excludes the exchange of sensitive information between SOEs.

The Commission did not follow this view. When analysing the PRC law on SOEs, it found (i) quite sweeping powers to appoint and remove key management, and (ii) powers to reward or punish management based on annual performance. These powers apply to large-sized SOEs that have bearings on the national economy, security, important infrastructures and natural resources. Another provision of the 2008 PRC law on SOEs ensures SASAC's participation in

profits and major decision-making. Finally, the 2008 PRC law on SOEs provides that the State shall increase the coordination of SOEs in vital industries. The absence of cross-directorships did not weigh sufficiently to lead to another conclusion.

For those reasons the Commission concluded that CGN was not able to independently decide on its strategy. As a consequence, the Commission ruled that the turnover of all companies controlled by SASAC “**that are active in the energy industry**” should be taken into account. (emphasis added).

While the independence issue is primarily relevant for jurisdictional purposes, it also has consequences for the **substantive assessment** of the transaction. For example, in the case at hand the Commission pointed out that “*neither GCN nor the Chinese State currently own a potential new nuclear site in the UK.*” (emphasis added).

CALL TO ACTION

This is the first time that the Commission took a position on the issue of Chinese SOE independence. While the criteria applied are not novel, the Commission did not have to rule on the issue in the past.



In all future matters involving Chinese SOEs, it will matter for both jurisdictional and substantive purposes whether the methodology used in the case at hand can be applied to them, which may be – to a certain extent – a question that depends on the sector.

DLA Piper has extensive experience in filing concentrations involving state-owned enterprises to the European Commission and is able to assist at any stage of the transaction. Should you have any questions in

relation to this article, please contact one of the authors listed below or the DLA Piper lawyer with whom you normally consult.



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CHEERS! THE EUROPEAN COMMISSION CONDITIONALLY CLEARS ACQUISITION BY AB INBEV OF SABMILLER

The European Commission has conditionally cleared AB InBev's acquisition of SABMiller under the EU Merger Regulation. The transaction is noteworthy since AB InBev is considered the world's largest brewer and SABMiller the world's second largest brewer. In order to overcome competition concerns, AB InBev is selling practically its entire SABMiller beer business in Europe. Asahi, a leading brewery of Japan, is said to buy all SABMiller units in France, Italy, the Netherlands and the UK.

The proposed acquisition by AB InBev of SABMiller would create a global market leader in the brewing industry. AB InBev's brands include Corona, Stella Artois and Budweiser. SABMiller's brands include Miller, Peroni, Pilsner Urquell and Grolsch. The European Commission has in the past reviewed concentrations in this industry, and its decisional practice and the case law of the Court of Justice of the European Union suggest that the relevant product market is that for the production and distribution of beer which is to be distinguished from other beverages.²⁸ Furthermore, the European Commission has generally considered that a distinction between on-trade distribution (i.e., beer distributed via such outlets as pubs, bars, restaurants, and hotels) and off-trade distribution (that is, beer sold by retail outlets) is relevant.²⁹

Both parties are of the biggest brewers worldwide. In Europe, however, Heineken and Carlsberg are the market leaders. The proposed transaction would bring together the third and fourth largest brewers by volume. Hence, the European Commission was concerned that in the member states where SABMiller was active, the transaction could lead to higher beer prices. The European Commission pointed out that Europeans buy around €125 billion of beer every year, so that even a relatively small price increase could cause considerably harm to consumers. The European Commission also thought that an important competitor would be removed which would make tacit coordination between the leading international brewers more likely.

More specifically, the European Commission found that the transaction would remove an important competitor in Italy, the Netherlands, the UK, Romania and Hungary, either at the level of the overall national beer markets or in important market segments. Taking into account the reduction of competitors, the risk of tacit price coordination would increase significantly. Furthermore, the European Commission emphasised that its investigation showed that European brewers engage in coordinated follow-the-leader type pricing in several member states. Companies set their prices according to

the largest competitor. In such market circumstances, the market leader takes the initiative of increasing its price, expecting that all competitors will follow.

In the Czech Republic, Hungary, Romania and Slovakia, AB InBev is active through its licensed bottler and distributor, Molson Coors. The European Commission was concerned that the proposed transaction would result in Molson Coors having fewer incentives to compete against SABMiller. The proposed transaction was also likely to increase tacit price coordination in those countries.

Finally, the European Commission pointed out that the number of multimarket contacts between brewers in the European Economic Area was likely to increase due to the proposed transaction. AB InBev's acquisition of SABMiller implied that the number of national markets where the merged entity and the two remaining supranational brewers would encounter each other would increase. In a dynamic context in which firms interact repeatedly, and tacit collusion is possible due to the limited amount of market players, an acquisition can affect prices by changing the degree to which coordination on pricing is possible. Multimarket contacts can improve a market player's ability to sustain high prices by pooling the incentive constraints which limit

²⁸ See Case M. 582 *Orkla/Volvo* of 20 September 1995; Case M.2044 *Interbrew/Bass* of 22 August 2000, Case M. 4999 *Heineken/Scottish & Newcastle Assets* of 3 April 2008; Case M.6587 *Molson Coors/Starbev* 6 June 2012.

²⁹ Case C-234/89 [1991] ECR I-977 *Stergios Delimitis v. Heninger Brau*.



tacit collusion. Taking into account the oligopolistic structure of beer markets and the results of the European Commission's investigation showing that brewers consider multimarket retaliation options, the European Commission required certain commitments before clearing the transaction.

In order to overcome the European Commission's concerns, AB InBev proposed to divest SABMiller's business in France, Italy, the Netherlands and the UK. Japanese brewer Asahi is said to be taking over these businesses. Furthermore, AB InBev has agreed to divest SABMiller's business in the Czech Republic, Hungary, Poland, Romania and Slovakia. It follows that essentially

all the European businesses that AB InBev planned to acquire from SABMiller's in Europe are divested, and that the intensity of competition in the European markets would not be negatively impacted by the transaction. The European Commission concluded that the transaction no longer raised competition concerns and approved AB InBev's acquisition of SABMiller. This is yet another concentration between large market players in which the European Commission and the parties took a pragmatic approach and together resolved the competition issues at the outset, allowing for a timely approval by the European Commission.



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TO SETTLE, OR NOT TO SETTLE: THE EUROPEAN COMMISSION ADOPTS DECISION IN HYBRID CARTEL SETTLEMENT CASE

The European Commission's Settlement Notice, first introduced in 2008, provides a settlement procedure in cartel investigations. In accordance with the Settlement Notice, the European Commission may invite a party, after having seen evidence in the European Commission's file, to acknowledge its involvement in the cartel and its liability for it. In return for the party's acknowledgement, the European Commission will reduce the fine to be imposed by 10 percent.

The aim of the settlement procedure is to simplify and speed up cartel investigations, reduce appeals before the Court of Justice of the European Union, and free up the European Commission's resources to pursue other investigations.

In addition to the lower fines and a swift and less burdensome procedure, a settlement decision adopted by the European Commission is considerably shorter and less detailed than an ordinary decision. It can thus help protect companies from claimants seeking follow-on damages.

The settlement procedure may be attractive to companies in many cases, and it has since its introduction been used in close to twenty cases. Uniquely, some of these cases have ended up being hybrid settlement cases, in which some parties settle, while one or more other parties hold out and do not settle. Undertakings under investigation do not always

consider settling the investigation. The assessment whether or not to accept a settlement offer of the European Commission is a tricky one.

In May 2016, the European Commission adopted a decision in a hybrid settlement case relating to an alleged cartel in the steel abrasives sector. The European Commission adopted a settlement decision in April 2014 concerning the participation in a cartel by four undertakings, Ervin, Winoa, Metaltechnik Schmidt and Eisenwerk Wurth, in the steel abrasives sector. The alleged cartel involved the exchange of information on key price components of all their sales in the European Economic Area. In particular, the parties agreed to coordinate the calculation models for scrap surcharges, to introduce an energy surcharge, and to coordinate behaviour with respect to individual customers. The four undertakings agreed to settle the case, and the European Commission imposed fines of €30 million after deducting 10 percent in return for the four undertakings having settled.

The biggest beneficiary of the settlement procedure was Winoa, which got a reduction of €2 million. However, one undertaking, Pometon, refused to settle. The European Commission continued its ordinary procedure and adopted, almost two years after having issued the settlement decision, an ordinary decision imposing a fine of just over €6 million on Pometon. It is unclear why Pometon decided to walk away from

the settlement discussions; however, it is clear that accepting an invitation by the European Commission to settle a cartel case is an offer some undertakings do consider worth refusing.

It is a complex decision whether to settle a cartel case or not. While an undertaking under investigation is given access to the evidence in the European Commission's case file, the European Commission only provides an estimate of the range of the fine it intends to impose. Elements for an undertaking to consider in determining whether to settle are the strength of the European Commission's case, the gravity and duration of the alleged behaviour, the strength of its legal defence, and the timing of the procedure. While a successful settlement procedure is more swift and less burdensome than an ordinary procedure, in certain circumstances an undertaking may wish to postpone the imposition of any fine. Similarly, although a settlement decision is shorter and less detailed than an ordinary decision, and thus may provide less ammunition to private damage claimants, it is arguable to what extent that will indeed be a benefit in light of the evidence disclosure rules introduced throughout the EU by the Directive on Antitrust Damages (2014/104/EU). In addition, accepting a settlement proposal by the European Commission requires the undertaking to admit to its participation in the alleged cartel, a thing undertakings are often



reluctant to do. A reduction in fine of merely 10 percent is often not enough to convince an undertaking to admit its liability.

Agreeing to a settlement procedure is not an option in every cartel investigation, and it is for the European Commission to determine whether or not it wishes to grant that option to the undertakings under investigation. Indeed, in most cases there are either no settlement discussions or they fall through completely

(such as in the smart card chips cartel in 2014). There are numerous factors to be considered when determining whether to settle, and often there is not much certainty in relation to the potential benefits. There seems to be only one certainty in relation to settlement procedure: it's not everyone's cup of tea.



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THE NETHERLANDS

NEW DUTCH LAW INCREASES MAXIMUM FINES

The entry into force on July 1, 2016 of amendments to the Dutch Competition Act (*Mededingingswet*) and the Establishment Act ACM (*Instellingswet ACM*) significantly increases the statutory fine limits for cartels and a number of other competition law infringements in the Netherlands, up to eight times the limit that applied before that date.

The amendment was triggered by two studies commissioned by the Minister of Economic Affairs in 2013 and 2014 into the effectiveness of cartel fines and their deterrent effect on potential infringers. The outcome of these studies was that the previous maximum fine for violations of the cartel prohibition at 10 percent of the annual global group turnover of the infringer – the same fine limit that applies in EU competition law (article 23(2) Regulation 1/2003) and in many other EU member states – might not have sufficient deterrent effect, in particular in two situations.

First, the studies found that for cartels of long duration, the benefit for the cartelists continues to increase the longer the cartel is in existence, whereas the maximum fine they can incur stops growing when it hits the 10 percent maximum. It was observed that such perseverance creates an incentive for cartelists to remain in the cartel and to keep the cartel running for as long as possible. The result is that while costs to society keep increasing, the cartel participants do not face any increased risk.

Second, it followed from the studies that the statutory maximum limit for fines could reduce the effectiveness of a previous measure designed to discourage cartel participation by repeat players. In 2009/2010, the Dutch government started applying a so-called high trust, high penalty approach, aimed on the one hand at providing guidance rather than sanctions and giving companies the benefit of the doubt in case of non-intentional violations (for instance by taking commitments from companies aimed at ending violations and preventing future infringements, instead of imposing fines), but on the other hand at imposing harsher sanctions for intentional violations, including cases of recidivism (*i.e.* committing an infringement a second or further time after having been fined for it). As one exponent of this policy, the policy rules for the calculation of cartel fines were changed, with the result that in a case of recidivism, the fine as calculated on the basis of the policy rules could be doubled. Because the statutory limit was not changed, however, it was observed that the amendment to the calculation mechanism would not be effective in cases where the fine as calculated would subsequently have to be reduced for exceeding the statutory maximum.

In the preparatory documents of the draft amendment act, citing statistics on cartel fines over the period 2010 – 2014, the Minister of Economic Affairs illustrated that such effects of the 10 percent fine limit were

not just imaginary. During those five years, a total of 32 cartel fines imposed on undertakings had to be cut off at the 10 percent limit.

The newly amended article 57(2) and (3) Dutch Competition Act (*DCA*) provide that for cartel fines, the statutory limit of 10 percent of the undertaking's annual global turnover is to be multiplied by the number of years that the infringement lasted, with a maximum of four years. This effectively raises the statutory fine limit to 40 percent of annual global group turnover if an undertaking participated for four years or longer in a cartel. Furthermore, according to new article 57(4) *DCA*, in case of recidivism (defined essentially as committing an infringement within five years from a previous similar infringement), the statutory limit is doubled, potentially raising the limit to 80 percent of the undertaking's annual global group turnover. The maximum fines for violating the abuse of dominance provision and for failure to notify a concentration are not amended and remain at 10 percent of the undertaking's global annual group turnover.

With the same amendment act, the absolute fine limits for several other violations of the *DCA* and the Establishment Act *ACM* are doubled from €450,000 to €900,000. This new limit applies to fines imposed on natural persons and to certain technical violations, such as a failure to cooperate with an *ACM* investigation. This increase is partially based on the



same considerations relating to the effectiveness of the DCA and partially should be considered as an inflation correction – the absolute fine limits have been the same since the introduction of the euro in 2002.

While the new fine maxima are law from July 1, 2016, they will only be applied with respect to infringements of the DCA starting on or after that date. For past violations or violations already in existence on the date of entry into force, the previous lower fine limits will continue to apply on the basis of article 7(1) ECHR. This means that it will probably take some years before the new statutory maximum fines will be applied in practice. It also remains to be seen to what extent the Dutch Competition Authority will make use of its ability to impose higher fines, since only the statutory limit is increased but not the way in which

finances are calculated, nor the Authority's considerable discretion in the process. In reviewing competition fines, moreover, the Dutch courts have made extensive use of their full jurisdiction to review the proportionality of competition fines and have lowered fines by up to 90 percent (in the case of *Wegener and individuals/ ACM*, Rotterdam District Court 27 September 2012, ECLI:NL:RBROT:2012:BX8528). It therefore remains to be seen whether the prediction of the Minister of Economic Affairs in answer to Parliamentary questions – that in a number of years the total amount of fines annually imposed by the Dutch Competition Authority may increase by some 50 percent – will come true. It nevertheless is certain that after July 1, 2016, the regulatory risk attached to entering into a cartel in the Netherlands has significantly increased.



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UKRAINE

MERGER CONTROL REFORM IN UKRAINE

For years, Ukrainian and multinational companies have been advocating for changes to Ukrainian antitrust regulations. One of the main concerns was that due to the very low notifiability thresholds, too many transactions that are unlikely to have any adverse effect on competition in Ukraine were subject to mandatory pre-completion merger notification. In response to these requests, the notifiability thresholds were increased and apply to any transactions which are completed after May 18, 2016. Increase of the notifiability thresholds was supplemented with introduction of a simplified fast-track notification procedure for concentrations which do not have significant effect on competition in Ukraine.

It is likely that as a result of increase of the thresholds, a significant number of cross-border concentrations will fall outside the scope of Ukrainian merger control, while large cross-border concentrations affecting the Ukrainian market will be closely scrutinised by the Antimonopoly Committee of Ukraine (AMCU).

There are two alternative notifiability thresholds. The first set of thresholds requires:

- worldwide value of assets or aggregate turnover of the parties to a concentration in the last financial year exceeds €30 million; and
- the value of assets or turnover in Ukraine of at least two parties to a concentration in the last financial year exceeds €4 million each.

The second alternative set of thresholds requires:

- worldwide value of assets or aggregate turnover of at least one other party to a concentration in the last financial year exceeds €150 million; and

- the value of assets or turnover in Ukraine of a target undertaking, or of an undertaking whose corporate rights are acquired, or of at least one founder of a new undertaking to be established (taking into account control relations) in the last financial year exceeds €8 million.

If the concentration meets the above thresholds, a permit for implementation of concentration must be obtained before completion of the transaction. In addition, some of the standard restrictive covenants (e.g., non-competes; covenants related to operation of the business between exchange and completion) are considered restrictive covenant and subject, to limited exemptions, require obtaining a separate permit from the AMCU to implement concerted actions.

In practice, it takes the AMCU up to 45 days from the date of notification to issue a permit to implement concentration. However, the AMC may issue the permit under the simplified fast-track procedure (the permit is issued within 25 days from the date of submitting of the notification), if one of the following criteria is satisfied:

- only one party to the concentration is active in Ukraine or
- the aggregate market share of parties to a concentration on the same market does not exceed 15 percent or
- shares or aggregate shares of parties to a concentration in the key markets does not exceed 20 percent

Even in cases where neither party to the transaction is a Ukrainian company and the transaction is implemented outside of Ukraine, clearance of the transaction with the

AMCU may be required if the above thresholds are met. Therefore, we would recommend seeking the – advice of Ukrainian competition lawyers before structuring the transaction in order to identify whether clearance by the AMCU may be required.



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This App is particularly relevant in the competition law context, providing a direct, immediate line to our antitrust team when timing is crucial. For instance, very recently, investigators carrying search warrants unexpectedly staged a dawn raid at a client's headquarters in Germany. Our Antitrust team was contacted using the Rapid Response hotline and was able to assist from the outset, advising on the scope of the search warrant and which documents could be legally seized or not seized, and suggesting solutions to mitigate the impact of the search on the client's business interests.

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KEY CONTACTS

DLA Piper is a global law firm located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world.

We have a leading global Competition and Antitrust practice across all areas including competition investigations by regulators, compliance, cartel enforcement defence, civil litigation, criminal antitrust defence and merger regulation. Our network of specialists allows us to provide clients with a fully integrated team who work closely together providing consistent quality across multiple jurisdictions. We also work closely with DLA Piper's full service international network to provide clients with a truly integrated service in particular with our trade and global government relations practice which represents clients in the political arena and in the media, giving us a unique perspective on the workings of governments and policy makers, and allows us to provide a broader range of solutions to the problems faced by businesses.

Our lawyers have the experience and insight to find creative and innovative solutions to competition law issues. Members of the team have gained experience not only in law firms but also as in-house counsel within global companies in a number of sectors, with trade associations, and as officials of competition authorities.

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