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NORTON ROSE FULBRIGHT

Competition World

A global survey of recent competition and antitrust law developments with practical relevance

Quarter 1: 2016

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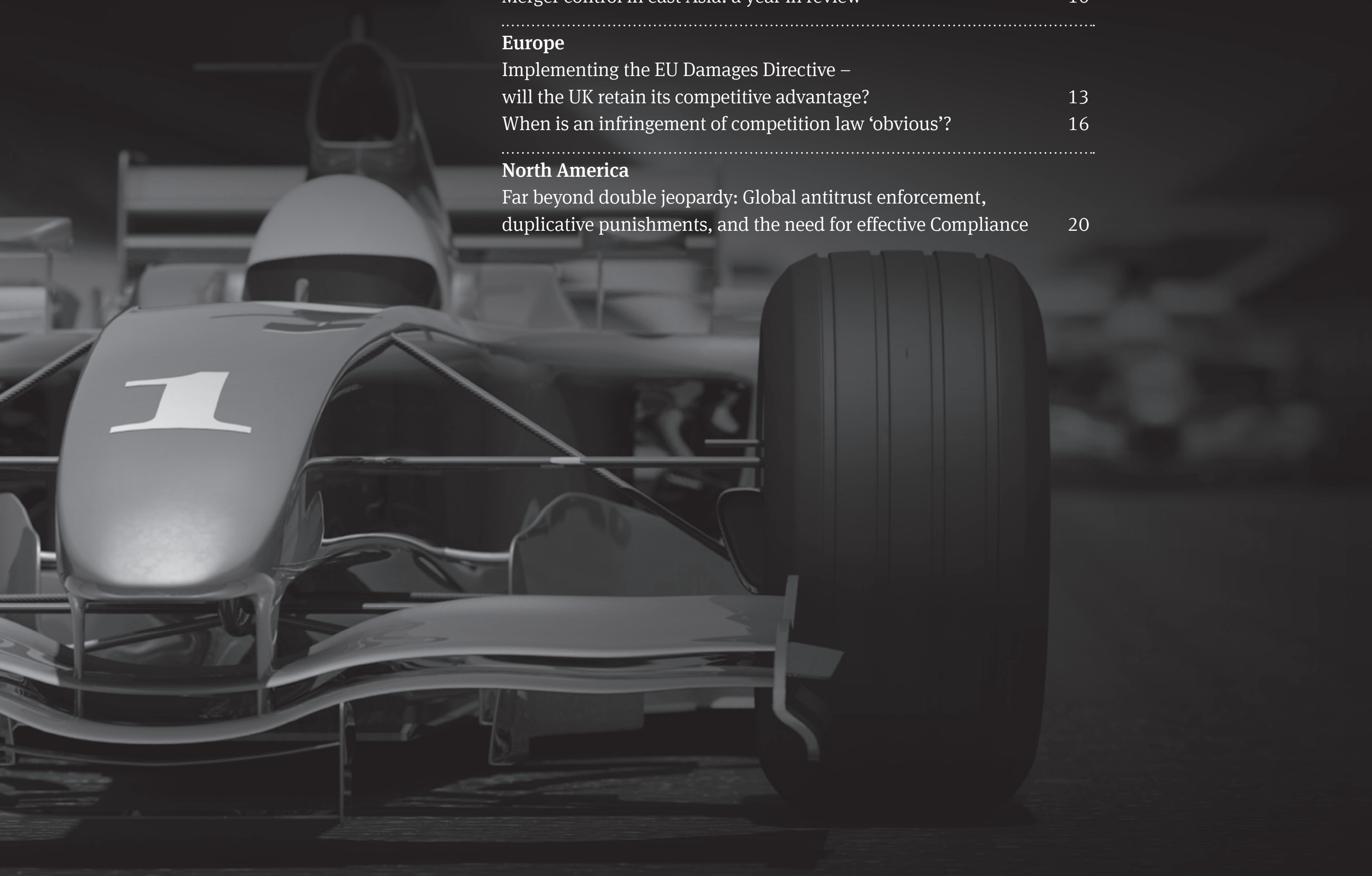

From the guest editor

Welcome to a special edition of Competition World. This edition focuses on antitrust developments in five key regions: Africa, Asia, Australia, Europe and North America. For each region, we comment on some of the most significant antitrust issues arising in 2015, and identify what this means for businesses in 2016.

We start with Africa, where competition law enforcement has intensified over the past 18 months both at national and regional levels. We explain that over 20 African countries now have national competition laws and several more have begun the process of introducing competition law, including Ethiopia and Mozambique. In addition, there are a number of regional agencies operating alongside national regulators who are seeking to play a more assertive role. The main message for business is that there is an increasing trend towards authorities actively pursuing cartels as opposed to playing it safe by focusing on merger control. This is leading to a number of procedural challenges being brought as companies entangled in investigations seek to test the limits of the new regimes. We expect antitrust investigations will take a considerable amount of time to resolve creating uncertainty and a lack of stability for both authorities and businesses alike.

In Australia, we examine the impact of the Harper Review, which was a 'root and branch' review of the Australian policy framework for antitrust law. In many cases the recommendations draw on international antitrust regulations, and illustrate the increasingly global approach to competition law.

In Asia, we focus on East-Asia and look at how the proliferation of M&A activity in the region led to an unprecedented number of merger control reviews in 2015. A common theme of a number of these deals was that they took place in already highly concentrated markets, meaning that the merger control process was often very lengthy. Many parties took steps to seek commitments at any early stage – a tactic that proved successful in some cases. Structural remedies were popular, particularly in IP-heavy industries where divestments were required in a number of cases. Another striking feature we witnessed was the extent of cooperation between the different antitrust agencies internationally. Most significant was the increased cooperation among the Asian competition authorities. This is a practice which the authorities have paid lip service to in the past but is increasingly being realised in practice. There are a number of high profile difficult multi-jurisdictional cases currently pending review in Asia so we expect to see increasing evidence of collaboration and coordination in 2016.

In Europe, while the European Commission remained focussed on cartel enforcement, it was not a strong year in terms of actual fines. There were, however, some significant European Court Judgments addressing the question of how far the Commission can extend the 'by object' category of infringements i.e. conduct which is so harmful that it is anti-competitive in and of itself, without the need for the Commission to prove it led to anti-competitive effects. In theory, by object conduct ought to be obvious, hence capturing price fixing, market sharing and bid-rigging. But, as we explain, there remain areas of uncertainty for business, notably concerning what information they can legitimately exchange with their competitors.

Meanwhile, as Member States act to introduce the Damages Directive by the end of 2016 to ensure that victims of anti-competitive conduct can obtain effective redress across the EU, we look at the approach being taken in the UK and ask whether this risks undermining the attractiveness of bringing such claims in the UK.

In North America, the antitrust authorities imposed record levels of fines for antitrust investigations, with fines for the auto parts and LIBOR cases reaching billions of dollars. The message for businesses is that it is vital to prioritise compliance with antitrust law. Other areas of compliance, such as sanctions or anti-bribery, might be easier to tackle in terms of training and monitoring because most individuals understand the issues and what to do and what not to do. Antitrust is more complicated – the answer is not always obvious. As a consequence it may well be your biggest risk area: get it wrong and you'll wish you got it right. Investing in a sophisticated antitrust compliance programme ought to be a number one priority for businesses in 2016.

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Martin Coleman
Editor
Global head of antitrust and competition
martin.coleman@nortonrosefulbright.com

African competition law enforcement – 18 months in perspective

Competition law enforcement has intensified across Africa in the last 18 months with significant developments occurring in several countries, as well as at a regional level. These developments will pave the way for more intensive enforcement in 2016.

Increased focus on cartels

Initially, newer African competition authorities have tended to focus on merger review. Efforts to detect and prosecute cartels have largely been left to the more established authorities, like the South African Competition Commission (SACC), which has been in operation since 1999. The SACC has reached cartel settlement agreements that have raised more than R4 billion in fines. The SACC has cracked major cartels in the cement, construction, bread and milk industries. In 2015 alone 35 consent orders were confirmed by the Competition Tribunal in which companies involved in price-fixing and bid rigging in South Africa agreed to pay more than R318 million in fines.

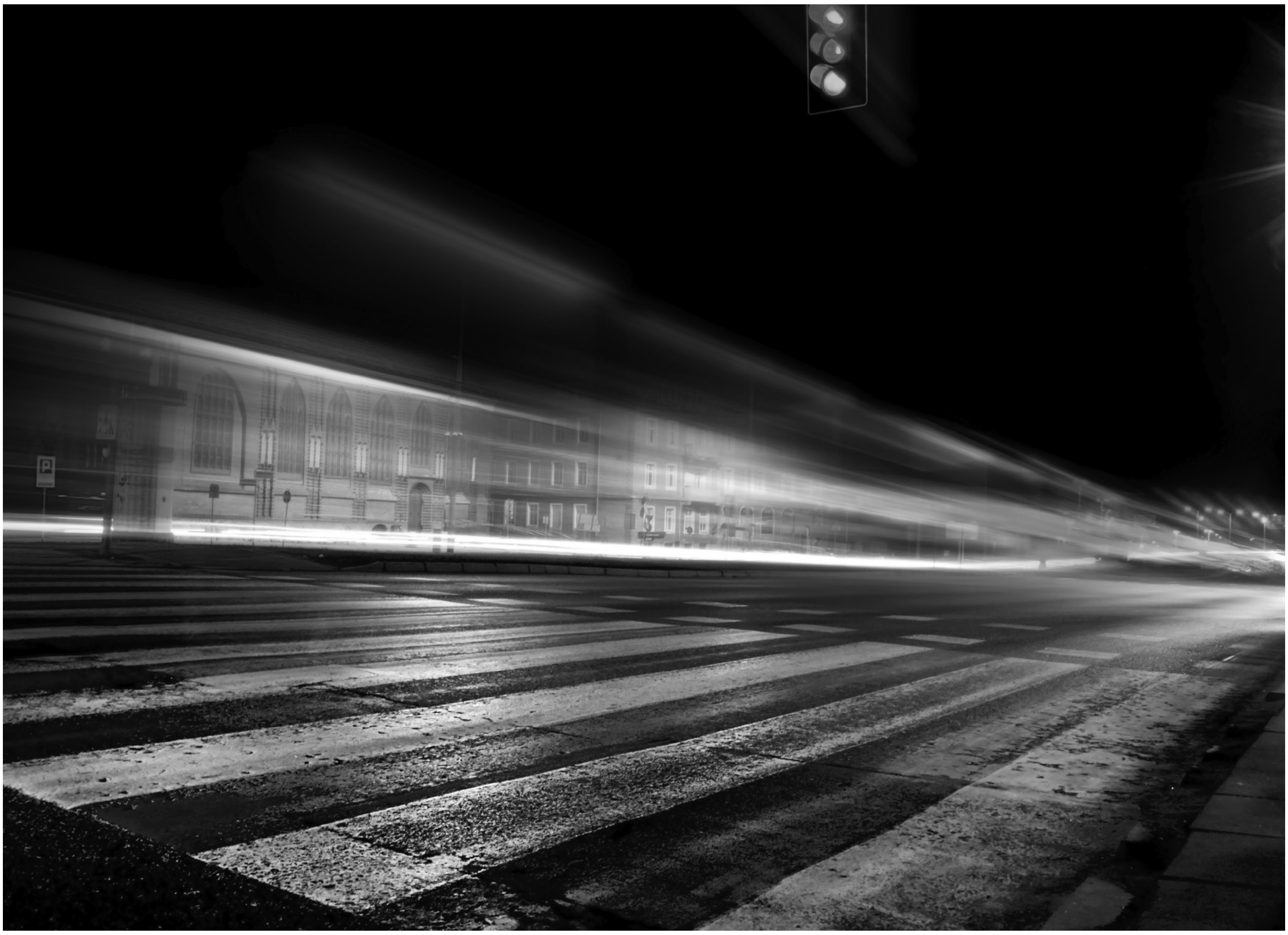
Over the last 18 months, several other African authorities have also actively pursued cartels. These investigations have tended to build on the experience gained in South Africa and other international jurisdictions. For example, authorities in Botswana and Namibia have focussed on price-fixing and bid-rigging in concentrated sectors that have been investigated elsewhere in Africa and abroad, such as the construction, health, financial services and agricultural industries. Recent examples include the investigations by the Botswana Competition Authority into alleged bid-rigging of public tenders for school rations, sugar beans, infant formula milk and building materials; the Kenyan investigation into price fixing by maize traders and millers; probes by the Zambian authority into alleged over-pricing of cement, baked goods and sugar, as well as investigations by the Tanzanian authority into alleged anti-competitive practices in the cement and petroleum industries.

African authorities are increasingly using their statutory powers to execute dawn raids as part of cartel investigations. For example, the Zambian Competition and Consumer Protection Commission (CCPC) conducted three dawn raids in the maize milling sector in 2015, and the South African Commission conducted four separate search and seizures in the fire control, recruitment advertising, furniture removal and liquid petroleum gas industries. These investigations were still underway at the time of writing.

Many of the SACC's successful cartel prosecutions have been sparked or bolstered by an application for leniency in terms of the SACC's corporate leniency policy (CLP), including the cement, construction and bread prosecutions. The CLP has been a hugely effective weapon in the South African Commission's arsenal since it was amended in 2008, with 126 applications for leniency in the Commission's 2013 and 2014 financial years alone.

This positive experience has prompted other African authorities to adopt their own leniency policies. For example, Mauritius introduced a CLP in 2012, and recently, the authority imposed its first fines on a cartel as a result of an application for leniency by Phoenix Beverages, which admitted that it had agreed with its competitor Stag Beverages that it would exit the Mauritian beer market, and in exchange, Phoenix Beverages would not sell beer in Madagascar. Phoenix Beverages paid a reduced fine of Rs20 million and Stag Beverages paid Rs6 million. Botswana, Zambia and Kenya have now also adopted leniency programmes, whilst Tanzania, Namibia and Madagascar are still at the drafting stage.

As has occurred in more established jurisdictions, an initial round of cartel enforcement has generated challenges before the courts based on constitutional or administrative law grounds. For example, in South Africa, challenges have been brought to the SACC's power to expand its complaints after they have been referred to the Competition Tribunal for adjudication, as well as to implement a leniency policy. In Swaziland alleged poultry cartelists have contested the powers of the Swaziland Competition



Commission to impose administrative penalties. This case is still pending. In 2015, the Namibia Association of Medical Aid Funds (NAMAF) was accused by the Namibian authority, the NaCC, of conducting its affairs in a collusive manner. NAMAF brought an application alleging that the NaCC has no jurisdiction over NAMAF and its member funds, which it also argues are not 'undertakings' for gain. A decision is expected soon. These procedural challenges are crucial to establish the limits on the power wielded by these new competition authorities, and will determine the shape of enforcement on the African Continent for many years to come.

Proliferation of national competition authorities and increased regional enforcement

Over 20 African countries now have national competition laws and in the last 18 months, several countries have taken steps towards enacting competition legislation, including Ethiopia and Mozambique.

In 2013, Mozambique adopted its long awaited competition regulations, which will for the first time introduce a merger control regime in that country. In light of the current high levels of investment into Mozambique, particularly in the energy sector, businesses should take particular note of the low thresholds for compulsory merger filings and the high filing fees.

Ethiopia passed a proclamation in March 2014 to establish the Trade Competition and Consumer Protection Authority, which is set to implement new laws to address abuse of market dominance, anti-competitive agreements and other practices that lessen competition.[1]

The last 18 months have also witnessed the establishment of several regional

1 See http://www.competitionauthority.co.bw/document-library?title=&field_document_type_tid=All&page=11 http://allafrica.com/stories/201512160159.html.

African competition law agencies by organisations like the Common Market for Eastern and Southern Africa (COMESA) and the Central African Economic and Monetary Community (CEMAC), which seem set to operate alongside and in some cases, in parallel to, national regulators.

The most prominent regional body is the COMESA Competition Commission (CCC), which has attempted to overcome initial negative reactions to its unclear merger regulations and high filing fees and to establish itself as a credible body in the African competition domain. In April 2015, the CCC announced that a merger in COMESA is only notifiable if both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more COMESA Member States; the combined annual turnover or combined value of assets, whichever is higher, in COMESA of all parties to a merger equals or exceeds US$50 million; and the annual turnover or value of assets, whichever is higher, in COMESA of each of at least two of the parties to a merger equals or exceeds US$10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in COMESA within one and the same COMESA Member State. The maximum filing fee has been substantially reduced – the filing fee is now the higher of 0.1 per cent of the combined annual turnover or combined asset value in COMESA, capped at a maximum of US$200,000.[2]

In just over 24 months, the CCC has already reviewed 49 phase two mergers (those which are classified by the CCC as likely to raise substantive concerns or which indicate a need for extensive evidentiary enquiries). The CCC also referred one merger in 2015 to a national competition authority, in the Holcim/Lafarge merger, which was referred for investigation by the Competition Commission of Mauritius (CCM) because of concerns about the particular impact of the merger in that country. This merger highlights the complexities of the referral process, as the CCM only approved this proposed merger after almost 320 days and imposed the condition that Holcim must divest its shares in its local Mauritian entity to an independent purchaser.

It is likely that the CCC will attempt to play a more assertive role in competition law enforcement in Africa in the future, with more in-depth merger investigations and more referrals of proposed mergers involving potentially anti-competitive effects to national competition authorities, particularly in jurisdictions with experienced authorities in operation like Kenya and Zambia.

CEMAC was founded in 1994 and is composed of six Central African States – Cameroon, the Republic of Congo, the Central African Republic, Chad, Gabon and Equatorial Guinea. It has enacted merger control regulations but so far, there has been little case law of interest and no action seems to have been taken against companies who have failed to notify transactions.

The East African Community (EAC) is another regional African economic organisation that has enacted antitrust regulations, although it is not yet fully operating. The EAC Secretariat is in the final stages of setting up the organisational structure of the EAC Competition Authority, which will regulate competition in Burundi, Kenya, Rwanda, Tanzania, and Uganda. The authority is expected to commence operations soon. Notification of mergers will be mandatory, although the thresholds for filings and the applicable filing fees have not yet been published. It is unclear how this regime will interface with COMESA and apply in states like Tanzania and Kenya (a COMESA member state) that have their own local authorities.

These new regional antitrust regulators will play a valuable role in preventing anti-competitive conduct and concentrations which may result in a prevention or lessening of competition on the Continent—particularly in countries like the DRC, Djibouti, Eritrea, Libya, and Uganda that do not yet have a national competition authority. There is the potential for regional bodies to act as a cheaper and faster one-stop-shop for merger clearances and to build up significant economic and technical expertise, particularly in dealing with cartels and monopolies that impact cross-border trade. Countries with insufficient resources may find it more effective to rely on antitrust enforcement by these regional authorities, than to establish their own national authorities. However, particularly in relation to merger control, there currently is no attempt to clarify the relationship between the national and the regional authorities, or between the various regional authorities. Kenya, for example, belongs to both the EAC and COMESA, and Tanzania has its own local competition authority and belongs to the EAC.

Increasingly interventionist merger control

The last 18 months have witnessed African authorities playing an increasingly interventionist role in merger control across the Continent. Merging parties can expect increased scrutiny and a greater likelihood of concerns being raised by African authorities.

2 See http://www.comesacompetition.org/wp-content/uploads/2015/04/Amendments-to-the-Rules-to-the-Determination-of-Merger-Thresholds-and-Method-of-Calculation-adopted-by-COM-26-March-2015.pdf.

For example, in the last 18 months, African authorities raised substantive competition concerns in a number of proposed mergers. In November 2015, the Competition Authority of Kenya (CAK) expressed concerns about the acquisition by Kenyan retailer Tusky of six additional retail supermarkets stores from Ukwala and only approved the transaction on condition that the number of acquired stores was limited to one. Meanwhile, the Botswana Competition Authority (BCA) recently approved the merger between Botswana casino operators Peermont and Sun International subject to a range of conditions, including the requirement for operational separation between Sun International's existing Botswana businesses and the target.

However, in many African countries, competition authorities can examine not only the impact of a proposed deal on competition – such as whether a proposed merger will reduce consumer choices or enable suppliers to raise prices – but also whether a merger raises any concerns from a 'public interest' perspective. In South Africa, 'public interest' grounds mentioned by the legislation include whether the merger may result in job losses or otherwise impact on employees, and whether the merger may be to the detriment of local suppliers. In January 2016, the SACC drafted a revised version of guidance on these issues, which we expect to be *published* in the course of 2016. In the event that substantial amendments are not made, the investigation of these public interest issues in South Africa in line with the guidance is likely to protract merger reviews and force merging parties to disclose significant volumes of information to the SACC.

A number of other African authorities have similar powers to investigate public interest issues arising from mergers in their competition laws, including Botswana, Kenya, Namibia, Zambia and Zimbabwe. Use of these powers is on the rise. For example, the NaCC recently imposed a two year moratorium on merger-related retrenchments in Namibia as a result of the merger of AngloGold Ashanti Namibia and Guinea Fowl Investments Twenty Six Limited.

Authorities are also becoming more vigilant in ensuring that conditions imposed on mergers are adhered to. For example, in 2015, the Tanzanian Fair Competition Commission announced that it was considering reversing its approval of the merger between East African Breweries and Serengeti Breweries because these two companies had allegedly failed to comply with the condition that Serengeti Breweries achieve a particular growth target. In August 2012, the Zambian CCPC announced a challenge to whether the conditions imposed by it on the BP Global (now Puma Zambia)/Castrol merger had been complied with. BP Global allegedly failed to comply with the condition to appoint local and independent distributors for Castrol products. The CCPC fined Puma Zambia and Dana Oil 50 billion Kwacha, which is 2 per cent and 0.1 per cent of their respective annual turnovers for the breach. Puma appealed and the fine was overturned because the Competition and Consumer Protection Tribunal (Tribunal) held that the CCPC may not impose a fine on parties who fail to comply with such conditions without first approaching the Tribunal.

Moving forward

These developments signal that competition law will increase in Africa over the next 18 months, as the newer authorities gain experience and additional national and regional enforcement regimes come online. Companies need to tailor their training and compliance programs to ensure that they are not at risk of substantial fines for cartel conduct and are ready to deal with a dawn raid in multiple jurisdictions across the Continent.

Businesses planning acquisitions will need to take into account the complexities of merger regulation across the Continent. In particular, merging parties will have to address potential public interest concerns in their merger filings and interactions with competition authorities on the Continent. Adequate time to obtain clearances from African competition law authorities needs to be built into transaction timetables at the outset of negotiating a transaction.

For more information contact:

Heather Irvine
Director, Johannesburg
heather.irvine@nortonrosefulbright.com

Australia on the cusp of legislative change

A significant review of Australia's antitrust regime has recently been completed. The Harper Review was a 'root and branch' review of the Australian policy framework for antitrust law, which was subject to significant consultation across industry sectors. The Australian Government recently announced its support in part or in full for 44 of the 56 Harper Review recommendations, which have the potential to reach beyond Australian borders and, in many cases, draws from international antitrust regulation. The timing for implementation of reform is not definitive. However, it is expected that draft legislation for consultation incorporating a number of these recommendations, will be published in 2016, while other reform proposals have been referred for specific consultation.

An ideal antitrust framework for Australia?

The Harper Review recognised that an effective antitrust regime is a vital element of a strong economy that drives growth and innovation. It sought to identify inefficient regulatory barriers across the economy that reduced productivity. It recognised that an effective antitrust framework will support the Australian Government's commitment to promote business-based research, development and innovation; rather than stifle it.[1]

Consistent with this context, it is clear that innovation is a key item on the Harper Review's agenda. A number of the Harper Review's recommendations relate directly to deregulating state-based regulation that may hinder innovation and productivity, such as planning and zoning regulation, restrictive taxi/ride-sharing regulation, restrictions on trading hours, and removing restrictions on the ownership and location of pharmacies. The Government proposes to consult further with the states and territories on deregulation, including funding state and territory reform. Further, and of national significance, recommendations on healthcare reform and road transport industries will be adopted, with these sectors fundamental to supporting national growth.

A contentious area of reform, which sits at the heart of innovation, is the proposed removal of the protection intellectual property enjoys from competition laws in Australia. This proposal does not have outright support from the Government, and will be subject to a Productivity Commission review. Reform in this sector has been debated for some time, with arguments that the removal of the protection will stifle innovation.

1 On December 6, 2015, the Australian Government announced its A$1.1 billion National Innovation and Science Agenda policy package.

A change in legislation

The Harper Review made a number of recommendations to amend the Competition and Consumer Act 2010 (CCA), the law governing Australia's antitrust regime. The implications of these proposed amendments are not only of significance to Australian businesses, but to any company that has operations which affect a market in Australia.

Cartel conduct

Amending the definition of 'competition'

Currently, the ambit of the law is ambiguous as to whether 'competition' extends beyond goods or services imported or rendered from overseas, to those that are a credible threat of being imported. The extension of the definition clarifies that the bounds of competition may not be restricted to Australia and recognises the globalisation of trade. Importantly, the extension of the bounds of competitive conduct has the potential to capture overseas conduct, which in the context of alleged cartel conduct, is a welcome expansion by the Australian regulator.

Broadening the joint venture exception to cartel conduct
Australia's cartel conduct provisions are overly complex compared to its international counterparts, including the Sherman Act. Further, the prescriptive nature of the Australian prohibition may capture agreements that are not necessarily 'hard core' cartels, such as an arrangement involving price or market sharing between a retailer and a supplier (that has its own retail channel) that increases total production via new sales channels. This may be pro-competitive, but the current exceptions do not shield the entities from a per se prohibition of the law. The proposal also seeks to amend the joint venture exception to cartel conduct.

Other anti-competitive agreements

Repeal of the price signalling provisions with a move to prohibit 'concerted practices'
The CCA contains an express prohibition against the sharing of sensitive information in public or in private. This contentious law currently only applies to the banking sector and has never been acted upon by the ACCC. Concerted practice is a better-known concept, and the proposed legislative amendment will bring Australia into line with the European Union. The prohibition in Australia will also be subjected to a 'substantial lessening of competition' test. Does this mean that the CP must be shown to have substantially lessened competition?

Third-line forcing subject to a competition test
Third-line forcing is currently per se illegal in Australia. Adopting this recommendation will bring Australia's approach into line with comparable jurisdictions such as the United States (US), Canada, and the EU.

The Harper Review went further to recommend the repeal of all prohibitions relating to exclusive dealing (also referred to as tying arrangements), including third-line forcing, proposing that such conduct is examined under a general prohibition against anti-competitive agreements between two or more parties. This further recommendation was not outright supported by the Government, but will be considered in further public consultation.

Resale price maintenance and immunity from prosecution
In Australia, resale price maintenance is per se illegal. Retaining the prohibition is consistent with other jurisdictions such as the UK and the EU. However, immunity from prosecution for resale price maintenance conduct will now be notifiable to the Australian regulator, which provides a simpler, quicker and less resource intensive approach to obtaining immunity.

ACCC processes (including merger clearance)

Streamlining and simplifying the formal merger review process
Currently, parties seeking merger clearance in Australia have three options: the ACCC's informal clearance process; the ACCC's formal clearance process; or, the Australian Competition Tribunal's authorisation process. The Harper Review's recommendation is to designate the ACCC as the decision-maker at first instance, and to broaden the clearance test to include a 'public benefit' test. The expansion of the ACCC's power to make decisions in the first instance including a public benefit test may entice parties to obtain clearance through the formal clearance process, as currently the majority of merger clearances are obtained on an informal basis. Against the ACCC's current assessment of a substantial lessening of competition, the new avenue may provide parties with an incentive to obtain sign off from the regulator in circumstances where the public benefit will outweigh any competition issues that exist.

ACCC power to make block exemptions
The ACCC currently has no power to make block exemptions. This recommendation will give the ACCC power to create safe harbours for certain conduct or categories of anti-competitive agreements. This amendment would be consistent with the position in the UK, EU and Singapore which all empower either the regulator or the government to exempt certain conduct from prosecution.

Reliance on admissions and findings of fact by the court
Admissions of fact in a non-contested proceeding brought by the ACCC could be used to establish the same fact in private proceedings against the same defendant if this amendment is implemented. This may encourage private parties to initiate litigation on the back of ACCC proceedings. This amendment would add another factor for parties to consider when contemplating settlement with the regulator, particularly for large cross-border cartel matters. It also has the potential to increase private class action claims for damages.

The Government also indicated a number of recommended legislative changes that require further consultation before it will support them. These include:

Overseas conduct that harms competition in an Australian market
Currently governmental consent is required if a party wishes to initiate proceedings regarding conduct that occurs outside Australia. No comparable overseas jurisdictions

require this. The Harper Review recommended that this requirement be removed. The Government recognised the need to remove barriers for private parties to access the legal system but did not outright endorse the recommendation and will consult further on this issue.

Misuse of market power – an 'effects' test

Currently, the prohibition against 'monopolisation' or 'abuse of dominance' does not require an assessment of the effect or likely effect of the conduct. Rather, the legal test is whether a firm with 'market power' has 'taken advantage' of that power for one of three prescribed 'purposes'.

Many international jurisdictions do not require 'purpose' or intent to be established to determine whether particular unilateral conduct is illegal. The prohibition against monopolisation in the US includes an examination of the intention of the accused (purpose) in the context of examining whether the conduct in question amounts to monopolisation or an attempt at monopolisation, but it is not the sole determinative factor.

The misuse of market power amendment – to introduce an effects test – is the most controversial of the Review's recommendations and has split the Australian business community. This recommendation created a reform bottleneck. The Government has referred this recommendation for further consultation to allow for the remainder of the proposals to be implemented.

Regulation of international liner shipping

Entities operating in international liner shipping are currently granted immunity from prosecution for engaging in cartel conduct in some circumstances. While the Government has not supported the outright repeal of the exemption from Australian competition laws, it will consider how the block exemption proposal can be used to ensure that shipping routes to and from Australia continue to be reliably and competitively serviced. By comparison, in the EU international liners are not regulated by sector specific laws anymore and are covered by general competition law. Inconsistencies between jurisdictions may result in a disconnect in laws that create inefficiencies for a mobile, global industry.

Intellectual property exception for anti-competitive agreements

Certain anti-competitive agreements are exempt from the application of the restrictive trade practices provisions where they relate to intellectual property. The Government has commissioned a review of the intellectual property regime, which will go beyond purely antitrust implications. This intellectual property exception is a unique feature in Australian and New Zealand competition law. Given the global nature of intellectual property, removal of this exception will expose industries which are patent dominant, to the application of antitrust law, such as pharmaceuticals.

Where to now?

The Review was a significant root and branch review of the Australian legal and policy framework for antitrust and competition law. The recommendations were extensive and mostly endorsed by the Government. Some more difficult issues such as remodelling the ACCC and reframing the prohibition against unilateral conduct require further consultation before the Government's position will become clear.

Given the range of recommendations varying in complexity, the Government has not provided a time frame for implementation. It is likely to be a year away before legislation to amend the CCA is introduced into parliament. In some cases these amendments will bring Australia into line with other global jurisdictions, which eases the regulatory complexity for global companies. However, the divergence in many areas of the law will continue to ensure that the application of an antitrust regime in one jurisdiction cannot be directly relied upon to ensure that culpability in Australia will be avoided.

For more information contact:

Nick McHugh
Partner, Sydney
nick.mchugh@nortonrosefulbright.com

Belinda Harvey
Special counsel, Sydney
belinda.harvey@nortonrosefulbright.com

Merger control in east Asia: a year in review

Significant increase in M&A activity leads to unprecedented number of merger reviews

In a year where the pace of global M&A transactions continued unabated, many if not all of the major deals were subject to scrutiny in several Asian countries. East Asian companies were also involved in many intra-Asian deals. Japanese companies in particular continued to invest significantly in other parts of Asia, leading to a significant number of merger filings across the region. Merger control procedures are now a well-established feature of any major M&A transaction; competition authorities in Korea and Japan annually review more than 500 and 300 mergers, respectively. The year's unprecedented level of M&A activity will likely lead China to reach similar numbers for 2015, an increase of one-third compared to previous years where China's Ministry of Commerce (MOFCOM) would review 200 cases on average. Authorities have streamlined their procedures to deal with the increase in the number of cases that are subject to merger review. Around three quarters of all cases notified in China are now reviewed under the simple case procedure, a process that typically lasts for less than one month after a transaction is accepted for review. Similarly in Korea, the Fair Trade Commission (KFTC) introduced a new simplified process in the summer of 2015, which delivers clearance within around two weeks of filing for simple transactions. The only country in the region that saw a decrease in the number of merger review procedures is Indonesia, where only 34 transactions were filed for clearance during the year, compared to more than 50 on average in the preceding two years. This may however be more a reflection of the prolonged review process rather than a slowdown in merger activity in the country.

Authorities required remedies in many difficult transactions

2015 saw a number of complex transactions, leading to protracted merger proceedings and decisions revealing increasingly sophisticated economic analyses in virtually all jurisdictions with active enforcement regimes, i.e. China, Japan, Korea, Singapore and Taiwan. While many transactions led to very significant concentration levels, parties attempted to resolve these by way of commitments. Structural remedies and other commitments were ordered in several such cases in China, Japan and Korea. In Singapore, Cebu Air and Tiger Airways had to significantly reduce the scope of their proposed transaction following strong opposition from the Competition Commission of Singapore, which expressed concerns of high concentration levels and limited competitive constraints on passenger flight routes between Singapore and the Philippines.

As the year drew to a close, several global transactions were pending review in several Asian countries (including AB-Inbev/SABMiller, Pfizer/Allergan, DuPont/Dow Chemical and Fedex/TNT), two domestic transactions were still pending phase-two review in Japan, and parties to a merger in the airfield lighting systems industry were negotiating stringent remedies in the hope of obtaining clearance in Singapore early in 2016. In this last transaction, the parties have proposed price-related commitments; a remedy that has been accepted by the competition authority in Singapore in previous instances where it had granted conditional approvals. Acceptance of price-related commitments has evolved into a common trend in the region and are now routinely accepted as part of the conditions to which an approval is subject, including in two transactions conditionally approved by KFTC in March 2015.

Focus on healthcare and technology markets led to one prohibition and several divestiture requirements

Several transactions in IP-heavy industries (particularly healthcare and technology) attracted the close scrutiny of Asian competition authorities during the year, leading to several remedies and the abandonment of one transaction.

In the healthcare sector, Japan's Fair Trade Commission required significant divestitures as a condition for its approval of the Zimmer/Biomet merger. Its counterpart in Korea required divestitures by Bayer in connection with its acquisition of Merck's consumer care business. Facing significant opposition from the Singaporean competition authority, Medi-Rad abandoned its proposed transaction of Radlink-Asia.

In technology markets, NXP's acquisition of Freescale was subject to divestiture requirements as a condition for approval in China and Korea, on account of the merged entity's high market shares. This is also the first transaction where MOFCOM ordered a 'fix-it first' remedy, requiring that the divestitures occur prior to closing of the transaction. Another transaction involving technology markets is Nokia's acquisition of Alcatel-Lucent, which was approved by MOFCOM subject to commitments by Nokia that it license certain standards-essential patents on fair, reasonable and non-discriminatory terms. These terms are similar to those imposed by authorities in China and Taiwan in connection with Microsoft's acquisition of Nokia's mobile telephone business in 2014, a transaction that was only cleared in Korea in August of this year, almost one year after it had closed. While the transaction was apparently notified as a merger under applicable Korean rules, the parties had undertaken a restructuring before closing. However, this factor neither prevented the pursuit of an investigation, nor the securing of commitments from Microsoft as regards its licensing practices, after the transaction had closed.

Competition authorities in the region have long had an interest in technology markets and related competition issues involving technology licensing. In October, MOFCOM revised the 2012 conditions it attached to Western Digital's acquisition of Viviti's hard disk drive business (Hitachi) and the 2011 conditions imposed in relation to Seagate's acquisition of Samsung's hard disk drive business, absolving the parties from some of their commitments on account of changing market circumstances. This followed an earlier decision adopted in the first days of the year, in which MOFCOM released Google from earlier commitments following the sale of its mobile handset business to Lenovo.

Fines for failure to seek clearance

Building on a series of decisions in China, Indonesia and Taiwan in previous years, authorities continued to penalise failures to seek merger clearance. In October, Taiwan's Fair Trade Commission imposed fines on taxi operators for their failure to notify. In September, MOFCOM imposed sanctions on six companies for failing to seek merger approval in four separate cases. These companies included parties to domestic mergers, confirming a trend observed in 2014 of a more aggressive enforcement of China's merger rules in the context of domestic transactions. An increase in purely domestic transactions being reviewed was similarly observed in China this year – 40 per cent during the third quarter of 2015 (the last quarter for which statistics are available) compared to historical levels hovering around 10 per cent.

Increased international cooperation in multi-jurisdictional mergers

Competition authorities in East Asia have long cooperated with their counterparts in Europe, the US and Australia in the framework of their review of international mergers. More efficient and systematic cooperation is expected to follow a second-generation Cooperation Agreement between competition authorities in Japan and Australia which was concluded in April. The agreement is significant as it allows the authorities to exchange confidential information among themselves without obtaining a waiver from the parties. In May, MOFCOM concluded a first Memorandum of Understanding on cooperation with Canada's Competition Bureau. In September a Memorandum of Understanding was concluded between the Korea Fair Trade Commission, the US Department of Justice and the US Federal Trade Commission. In October, MOFCOM and the European Commission agreed on best practices for cooperation on reviewing mergers. The agreement, which took the form of a joint 'Practical Guidance', gives recognition to the efficiency-enhancing benefits of a collaborative review of the same transactions and the authorities' mutual interest of achieving an accordant outcome.

Perhaps most significantly, 2015 saw an increase in cooperation among Asian competition authorities. In April, following the announcement made by Applied Materials and Tokyo Electron that they had abandoned their proposed merger due to antitrust concerns, MOFCOM issued a press release explaining that it had cooperated extensively with foreign competition authorities during its review of the transaction, specifically referring to the Korean Fair Trade Commission. The Korean Fair Trade Commission separately issued its own press release in which it confirmed that it had cooperated extensively with competition authorities in China, Japan and Taiwan during its review of the case.

What to expect in 2016

Although the caseload of merger control authorities depends on parties' appetite for engaging in M&A transactions, a number of difficult multi-jurisdictional cases are pending review by Asian competition authorities. These will put to the test these authorities' ability to coordinate their enforcement with their overseas counterparts. China is expected to further develop its guidance on substantive review and procedure. Elsewhere in the region, competition authorities in the Philippines and Myanmar should prepare for the introduction of their new merger regimes due to take effect in 2017, while other jurisdictions – such as Indonesia, Malaysia and Thailand – may consider reforming their respective competition legislation to reform the way mergers are assessed.

For more information contact:

Marc Waha
Partner, Hong Kong
marc.waha@nortonrosefulbright.com

Pearl Yeung
Associate, Hong Kong
pearl.yeung@nortonrosefulbright.com

Implementing the EU Damages Directive – will the UK retain its competitive advantage?

The competition litigation landscape is changing across the EU as Member States act to implement the directive on antitrust damages actions[1] (the Directive) by December 27, 2016. The Directive is designed to make it easier for victims of anti-competitive conduct to obtain compensation for loss suffered across the EU. It introduces a minimum standard for antitrust damages actions which all EU Member States are required to meet.

Over the past two decades, the UK has developed into a jurisdiction of choice for claimants looking to launch competition law claims with a growing number of both follow-on and stand-alone claims being issued. The UK has a number of features that make it attractive to claimants, including: (i) an experienced judiciary; (ii) a permissive attitude to jurisdiction; and (iii) a degree of certainty on many key issues following years of litigation.

In many respects, the substantive provisions of the Directive mirror the existing provisions of UK law such that the UK is already compliant with the terms of the Directive. While there are some limited but important exceptions which will require amendment to UK law, in the majority of cases, no amendments are required.

On its face, it therefore seems likely that the incentives for claimants to bring pan-EU claims in the UK should remain unchanged. However, the Government's proposed method of implementation of the Directive could have material unintended negative effects for the development of competition litigation in England and Wales.

The main provisions of the Directive

The Directive is designed to encourage claimants to bring private competition claims whilst ensuring that: (i) companies are not incentivised to bring vexatious and abusive claims; and (ii) the risk of claims does not deter applicants under the Commission's leniency programme.[2]

In summary, the main provisions of the Directive are as follows:[3]

- Passing on – the Directive confirms that 'indirect' purchasers are entitled to issue proceedings to recover loss suffered as a result of a cartel. This confirms the accepted position in the UK that anyone that suffered loss as a result of a cartel can bring a claim even if they did not directly contract with any of the cartelists.
- Presumption of pass-on – the Directive introduces a rebuttable presumption that an overcharge levied on a direct purchaser was passed on to an indirect purchaser. However, the indirect purchaser will still need to prove the extent of the overcharge that was passed on. Amendments to existing legislation will be required to formalise this presumption in UK law (although we do not expect it to have a significant impact on the parties' positions).
- Presumption of harm – the Directive introduces a rebuttable presumption that cartels cause harm. This concept does not currently exist in English law. However, the Government has made it clear that – while courts will have the power to estimate loss – they are expected to apply existing principles to calculate the harm caused.
- Joint and several liability – it is well established in the UK that cartelists are jointly and severally liable for all of the loss caused by the cartel. However, amendments to existing law will be necessary to exempt the leniency applicant from joint and several liability.
- Disclosure – the Directive requires Member States to introduce a disclosure regime. Disclosure is an established feature of UK litigation and existing law goes significantly beyond the requirements of the Directive. However, some limited amendments to the Civil Procedure

1 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

2 This is a key consideration for the Commission with over 85 per cent of its cartel cases having been triggered by leniency applications.

3 For a detailed discussion of the provisions of the Directive see pages 12–14 of the previous issue of Competition World.

Rules and the CAT Rules will be required to provide absolute protection to leniency submissions (in practice, this confirms the existing case law position established in National Grid[4]).

- Protection from contribution claims – the Directive introduces a requirement that a defendant that settles a claim should be protected from contribution claims by co-defendants. This is intended to increase the incentives for defendants to settle early. Amendments will be required to formalise this position in UK law (although there is currently an accepted mechanism to settle competition claims which makes it unattractive for contribution claims to be pursued against the settling defendant so, in practice, this is unlikely to have a significant impact).

- Limitation – the Directive introduces a requirement that limitation periods should be at least five years, commencing when the infringement has ceased and the claimant knows or can reasonably be expected to know of the infringement, harm and the identity of the infringer. For follow-on claims this mirrors the current position under English law (although English law provides for a six year period). For stand-alone claims, the Directive is ambiguous and open to interpretation.[5] The Directive also introduces a requirement that the limitation period be suspended for the duration of the investigation. This is not currently addressed by English law (although the courts do have procedural powers to order a stay of proceedings for the duration of the investigation).

BIS proposals for implementing the Directive

The Government launched a consultation on January 28, 2016 on how it would make what it described as the 'relatively minor changes required to implement the Directive in the UK'.[6] This consultation closed on March 9, 2016 and the Government is currently in the process of considering the responses that it received.

The consultation document is short, containing only: (i) 36 paragraphs which set out proposed changes to the UK regime; and (ii) six questions for respondents. Given the Government's acknowledgement that only limited changes to the UK regime are required to comply with the Directive, this summary approach is not unexpected.

However – notwithstanding the fact that only limited amendments are required – the Government made it clear in the consultation document that its intention is to 'copy out' ***all*** of the substantive provisions of the Directive into UK law (i.e. to copy the wording from the Directive directly into UK law).[7] It intends to adopt this 'copy out' approach (amending/replacing existing law) in *all* cases regardless of whether UK law is already compliant with the terms of the Directive.

The Government's rationale for adopting this approach is to provide 'certainty' for claimants and businesses. Rather than create certainty, our view is that this approach will give rise to significant new uncertainty for both claimants and defendants about how the courts will interpret the new provisions in the Competition Act 1998 and the new procedural rules.

The problem with the 'copy out' approach

The primary issue with the Government's proposed approach is that it risks overriding existing authority on a number of key issues. The competition litigation landscape in the UK is well-developed, with a number of longer running cases having established how a number of key concepts will be applied. It is this certainty that has contributed to the attractiveness of the UK courts in the eyes of litigants.

For example, the existing disclosure regime goes beyond the requirements of the Directive. It has been the subject of significant judicial consideration.[8] Although some amendments to the Civil Procedure Rules and CAT Rules are required to implement the Directive requirements on disclosure (as explained above), copying out the provisions of the Directive relating to disclosure into UK law would risk narrowing the existing rules on disclosure of evidence in competition claims. This would give rise to particular confusion in claims that include both competition law and non-competition law causes of action.

In our view the Government's proposal to 'copy out' the Directive wording risks creating scope for disputes and satellite litigation on the copied out language. We would favour a more considered approach which: (i) only implements the Directive where change to UK law is necessary; and (ii) even where amendments are necessary, considers

4 *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 (Ch).

5 It appears that provided an infringement is ongoing the claimants do not have to consider limitation and can claim back for an indefinite time period – the opposite result to that reached by the Court of Appeal in *Arcadia v Visa* [2015] EWCA Civ 88.

6 Department for Business Innovation and Skills consultation paper – Implementing the EU Directive on damages for breaches of competition law dated January 2016 – https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495757/BIS-16-6-consultation-implementing-the-EU-directive-on-damages-for-breaches-of-competition-law.pdf

7 Paragraph 7.23 of the Consultation Paper.

8 Including in: (i) *National Grid v ABB* [2011] EWHC 1717 (Ch); (ii) The *Secretary of State for Health and others v Servier Laboratories and others* (Claim No HC11C01423); and (iii) *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024.

the impact of purely ‘copying out’ the Directive wording. As a minimum – if the Government elects to proceed with its ‘copy out’ approach – we would support a provision for the new law to be interpreted in line with existing case law for issues already addressed in the UK system.

Next steps

We expect the Government to publish its response to the consultation in June 2016 setting out the decisions that it has taken. It appears that at this stage the Government does not intend to carry out a further consultation on the wording of the draft legislation. However, its proposed approach may change following review of the consultation responses and the Government may share the draft text with a group of expert competition law practitioners prior to implementation.

The future of competition litigation in the UK

Although the Directive should achieve the Commission’s aim of removing a number of the procedural barriers to bringing private damages actions in many EU Member States, the incentives for claimants to bring pan-EU claims in perceived ‘claimant friendly’ jurisdictions – such as the UK, Germany and the Netherlands – are likely to remain unchanged.

Although the purpose of the Directive is to introduce a minimum standard across the EU, many of the factors that make these jurisdictions attractive – such as favourable procedural rules, experienced judiciaries and efficient case management will remain.

In fact, the UK is likely to become increasingly claimant-friendly with the introduction of an ‘opt-out’ system for collective actions – a proposal rejected by the EU.[9] In fact, the first such action was launched earlier this month by the National Pensioners’ Convention in respect of increased prices paid for mobility scooters.

We would encourage the Government to think again before electing to ‘copy out’ *all* provisions of the Directive, to avoid introducing new uncertainty to issues that have been settled. Nonetheless, we expect that the UK courts will remain the claimants’ forum of choice and that an increasing number of claims will be issued in the coming years as the Consumer Rights Act reforms – and in particular the ‘opt-out’ regime – start to take effect.

9 For further detail on the collective action regime see pages 3–5 of the previous edition of Competition World.

For more information contact:

Peter Scott
Partner, London
peter.scott@nortonrosefulbright.com

Mark Simpson
Partner, London
mark.simpson@nortonrosefulbright.com

James Flett
Senior associate, London
james.flett@nortonrosefulbright.com

When is an infringement of competition law ‘obvious’?

Considering the state of the ‘object’ infringement following the latest EU Court judgments

It is well-established that under EU competition rules, anticompetitive arrangements are categorised as either ‘by object’ or ‘by effect’. This categorisation is significant because, in the case of by object infringements, there is no requirement on the enforcing authority to establish anticompetitive effects in the relevant markets to find an infringement – and impose potentially severe penalties. Recent cartel investigations in sectors as diverse as TV/computer monitor tubes, automotive bearings, and interest rate derivatives have led to very high levels of penalties, with total cartel fines imposed by the EU reaching just under €2 billion in each of 2012, 2013 and 2014.

By contrast, in by effect cases, the authority must demonstrate that the arrangements in question led to an actual anticompetitive effect in the relevant market, for example through price increases which would not have occurred absent the arrangements in question (i.e. in what is commonly referred to as the counterfactual).

The justification for this dichotomy is that there are procedural inefficiencies in requiring the authority to establish detailed economic effects arising from conduct which is clearly anticompetitive. In such cases the authority should be able to cut through the process and impose a penalty in order to punish the infringing parties and to deter similar future behaviours, without being waylaid by complicated arguments around establishing the actual effects of the conduct in question.

It has long been recognised that the most serious types of competition law infringement – such as price fixing, market or customer allocation, and bid-rigging – will be treated as amounting to by object infringements. Indeed, the EU has issued guidelines confirming that these categories of behaviour will be treated as infringements by object – and so their actual effects are not relevant to the existence of a competition law infringement.

So far so good

Over the years, the case law of the European courts, and the decisional practice of the European Commission, has been required on many occasions to identify whether particular behaviours qualify as by object infringements, or whether they are insufficiently obvious infringements of competition law such that they should be treated as illegal only if an anticompetitive effect can be demonstrated. This is to be expected as there will always be a need to define boundaries to any legal concept.

Of particular importance to businesses is the point at which exchanges of information – i.e. discussions around market conditions or gathering of market intelligence, either directly between competitors or indirectly via suppliers or customers – might be considered so obviously anticompetitive as to constitute an infringement by object. The categorisation of conduct in this area is critical, as by object arrangements are treated as tantamount to cartels, incurring the most serious penalties and having no ability to argue that there was an absence of competitive harm in their defence. However, it is equally recognised that there will be necessary and productive exchanges on certain points between competitors (e.g. common innovations to improve industry standards) which should not be prevented through fear of competition sanctions.

Arrangements which fall outside the ‘by object box’ face a higher evidential hurdle from the regulators’ perspective in that the competition authority must show an anticompetitive effect as a direct result of the conduct in question. Consequently, conduct which falls under the by effect categorisation has proven less likely to be investigated at all given the greater challenges the competition authority faces in demonstrating an anticompetitive effect.

All of this goes to the critical question for modern business of the correct compliance standards to impose: legal uncertainty as to what constitutes a by object infringement will lead to either overly restrictive or overly permissive compliance standards, neither of which are of broader benefit to economic welfare.

Two European Court judgments over the past year are important to consider – *Cartes Bancaires* and, more recently, *Bananas*. We consider below what light these cases shine on the definition of the object infringement – and the lessons for businesses in terms of the level of interaction which is permissible with competitor entities.

The object infringement prior to *Cartes Bancaires*

It was the 1966 *Consten & Grundig* judgment of the European Court of Justice (ECJ) which first established that it was not necessary to demonstrate the effects of an anticompetitive arrangement once its anticompetitive object had been established. This delineation has been followed in numerous cases over the years. Advocate General Kokott in the *T-Mobile* case provided the oft-quoted analogy that object infringements are akin to drunk driving, i.e. inherently wrong, and merit sanction even where there has been no actual harm as a consequence of the actions in question.

A number of leading cases over the year have given further insights into conduct which should be treated as an infringement by object. The *Beef Industry Development Society* (BIDS) case is a prime example which established that a Government-sponsored initiative to manage industry overcapacity would fall into the object category – the case concerned an initiative by an Irish beef processing association comprising ten companies to address overcapacity in the industry by reducing the number of processors by 25 per cent. BIDS asked some members to exit the industry in Ireland for at least two years, disposing of equipment and decommissioning land. Those exiting would be compensated by those staying in the market during the course of the agreement. BIDS argued that the agreement would not adversely affect competition, but aimed to improve competitiveness in the beef industry. The ECJ disagreed, holding that through a coordination of market outcome – which prevented the natural selection of market players – the arrangement indeed had as its object the restriction of competition. Importantly, the ECJ made clear that in determining the existence of an infringement by object, the lack of any *subjective intention* of the parties to distort competition is irrelevant. From a policy perspective, this raises challenges: should parties be punished for cartel-like behaviour when they genuinely did not believe the arrangements they were entering were anti-competitive?

The case of *Allianz Hungaria* further clouded the edges of the 'object box': this case involved an arrangement between the insurer, Allianz, and the Hungarian National Association of Automobile Dealers, under which Allianz agreed that repair charges could be increased by dealers in proportion to the volume of Allianz insurance policies sold by the dealers (acting as agents for Allianz). The ECJ concluded in this case that the existence of a remuneration link between repair services and volume of insurance contracts sold did not of *itself* constitute a by object restriction. However, when considered in the relevant legal and economic context, the provisions did amount to an object infringement. This ruling suggested it is necessary to look to the nature of the goods or services, and the 'real conditions of the functioning and structure of the market' to determine an infringement by object. This raises real uncertainty – there are types of conduct which may be treated as the most serious 'by object' infringements, but only when considered in their proper economic context. Does this not entail considering their effects. And if this is the case, how should such types of behaviour be distinguished from the less 'obvious' competition infringements where a full 'by effect' analysis is required?

Cartes Bancaires: return of the restrictive approach

The *Cartes Bancaires* judgment has been broadly viewed as seeking to restore a more balanced and certain approach to what constitutes a by object infringement. The case involved a system set up in 1984 by the principal French banking institutions to manage payments and withdrawals using issued cards of the member banks. Card users would be able to use an ATM of any of the member banks and to pay for trades using the card.

In 2002, the group notified the European Commission of its plan to make a series of changes to pricing policies. The Commission found these arrangements to breach competition rules on the basis that they included a mechanism which encouraged exclusion of other potential card offerers and provided for the member banks to increase charges for use of bank cards. One of the questions then considered on appeal was whether this system – which was essential to the

operation of bank cards within France – was so obviously a restriction of competition that it should be treated as a by object infringement.

Ahead of the final judgment, Advocate General Wahl urged the ECJ to 'refine its much debated case law on the concept of restriction by object', calling for a more restrictive interpretation. In his view, a clear list of categories of behaviour amounting to by object infringements was the correct approach as it would provide (1) legal certainty; (2) deterrence of future infringement; and (3) procedural economies by avoiding detailed investigation in obvious 'by object' cases. Wahl concluded that the measures implemented in the *Cartes Bancaires* case were not sufficiently obvious, and related to financial contribution by members to the operating costs of the bank card system, and protections to prevent free-riding through an incentives scheme. The question of whether there was a negative impact on competition was therefore necessarily effects-based.

This opinion was absorbed in the ECJ's final decision, which returned to the traditional reliance on the assessment of the 'nature' and 'sufficiency' of harm, rather than the broad analysis used in *Allianz Hungaria* which required consideration of the relevant legal and economic context.

The decision was broadly welcomed by the competition law community in providing a clearer framework as to what behaviours amount to a 'by object' infringement – although the Commission's response was that the *Cartes Bancaires* decision was in any event in line with its approach and previous case law.

When importers slip up: he *Bananas* case

The next big decision on the question of 'by object' infringements was in March 2015. This case first concerned a finding by the Commission in 2008 of a price-fixing cartel in Northern Europe between banana importers, Chiquita, Dole, and Weichert, imposing fines of €60.3 million (although Chiquita received immunity for whistleblowing under the Commission's leniency scheme).

The facts centred on the defendants' weekly setting and announcement of 'quotation prices' for bananas for the coming week. Prior to setting these weekly quotation prices, the parties had regularly exchanged information by way of telephone calls, discussing a range of market factors relevant to the level of quotation prices *although not agreeing the quotation prices themselves*. These factors included, at the extreme, apparently innocuous information such as weather predictions and how these might impact upcoming banana crops.

The parties would then formally exchange price quotations after these had been determined, allowing for them to monitor the correlation between pricing decisions and pre-pricing discussions. The parties argued that the factors discussed were not sufficiently proximate to their actual quotation prices to amount to an obvious 'by object' infringement, and that consideration of the effects of the arrangements should have been undertaken. The parties also argued that quotation prices did not correlate to actual prices subsequently agreed in negotiations with customers, that quotation prices related to green bananas, rather than yellow bananas which were ultimately sold to customers, and that operation of banana import quotas (i.e. a de facto supply limitation) meant that such discussions were incapable of distorting competition in any event.

The ECJ rejected the parties' appeal in its entirety, stating that there are categories of conduct which are so likely to distort competition that any analysis of the effects, or construction of a counterfactual, is unnecessary. The judgment is significant in its treatment of information exchange – it held that communications between competitors around quotation prices were relevant to the market, as even where discussions do not relate directly to price, it is possible from such signals, market trends or indications to infer the intended development of prices – and that such exchanges should therefore be treated as 'by object' infringements. This echoes the 2009 *T-Mobile* case, in which information exchange was considered to be 'tainted with an anticompetitive object' for being 'capable of removing uncertainties concerning the intended conduct of the participating undertakings'. In *T-Mobile*, too, the Court had seen as irrelevant the consideration of actual effects in its finding of liability.

Conclusion

While the debate around the delineation of the 'by object' infringement will continue, it is to be hoped that the European Courts, when judging whether a practice between market players is anticompetitive by object, will continue to tend towards a category-based approach which limits the 'by object' framework to truly 'obvious' competition law infringements. As per the opinion of AG Wahl in *Cartes Bancaires*, there are clear benefits of this approach: legal certainty will allow business to more easily regulate its conduct when armed with a pre-determined list of clearly infringing behaviours.

However, the concern remains that the case law demanding that behaviour be considered in its context allows a wider application of the 'by object' category. In particular, where this case law is relied upon to capture complex arrangements which have not been considered in previous cases, or information exchanges which are not obviously related to pricing or competitive behaviour, there is a legitimate concern that the 'by object' category is being abused. The consequence of this will be businesses taking a more cautious approach to competition compliance than is actually necessary and not participating in arrangements which may well in fact have positive economic outcomes for both the parties involved and consumers more broadly – for example information sharing which facilitates innovation or efficiencies.

Developments in this area will continue to be watched closely in any event.

For more information contact:

Ian Giles
Partner, London
ian.giles@nortonrosefulbright.com

Far beyond double jeopardy: Global antitrust enforcement, duplicative punishments, and the need for effective compliance

The proof is in the numbers—antitrust enforcement in the United States has exploded in recent years. The Antitrust Division of the Department of Justice reported criminal fines of $1.3 billion for fiscal year 2014 and an average yield of almost $1 billion in finds from 2009 to 2014.[1] Fines resulting from the auto parts and LIBOR antitrust investigations caused fiscal year 2015 fines to more than double any of those totals, reaching an all-time high of $3.6 billion.[2] These fines rival and in some cases best fines imposed in two other key US compliance areas, Foreign Corrupt Practices Act[3] and international trade sanctions.[4] Given the enforcement climate and unprecedented criminal fines, antitrust compliance should be rocketing to the top of the list of compliance priorities for businesses potentially impacted by the increased enforcement.

This point is made all the more pressing by the fact that antitrust enforcement has become a major emphasis around the world. Antitrust violations often touch multiple jurisdictions, causing multiple enforcement authorities to become involved. As Deputy Assistant Attorney General Brent Snyder recently stated in remarks at the Sixth Annual Chicago Forum on International Antitrust:

'*The United States is now almost always joined in investigating and punishing international cartels by the European Commission, Japan, Brazil, Canada, Australia, and others. These jurisdictions investigate with vigor and impose tough sanctions. As a result, companies are now exposed to enormous monetary penalties around the world.*'[5]

Recent figures bear out DAAG Snyder's point. For example, the European Commission issued nearly 1.7 billion in fines in 2014 and nearly 1.9 billion the year prior.[6] Competition authorities from Brazil to China have stepped up enforcement as well, imposing large sanctions on cartel participants.[7]

The recent overseas enforcement trend indicates that competition law is now, more than ever, a global compliance risk. Companies operating in multiple jurisdictions face investigation and potential punishment by multiple competition authorities.

Given the surge in antitrust enforcement and the large penalties associated with violations, an essential component of any risk management program for an international business is a robust antitrust compliance program. Such programs assist companies in preventing antitrust violations altogether, thus avoiding the morass of duplicative enforcement actions from national competition authorities across the globe and follow-on private litigation in certain jurisdictions. Even if it fails to prevent a violation, an effective compliance program also has the potential to assist companies in obtaining leniency from authorities and reducing fines ultimately levied.

1 Criminal Enforcement: Trends Charts Through Fiscal Year 2015, ANTITRUST DIV., DEP'T OF JUSTICE, http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last updated Dec. 10, 2015).

2 Id.

3 See Richard L. Cassin, The 2015 FCPA Enforcement Index, THE FCPA BLOG (Jan. 4, 2016), http://www.fcpablog.com/ blog/2016/1/4/the-2015-fcpa-enforcement-index.html (recounting $133 million in FCPA fines during 2015, $1.56 billion in FCPA fines during 2014, and an average yearly total of fines equaling $805 million from 2009 to 2015).

4 See Justice News, Office of Public Affairs, Dep't of Justice (last visited Dec. 28, 2015), http://www.justice.gov/justice-news (showing press releases containing the search term 'IEEPA'— demonstrating fines and forfeitures to the Department of Justice arising out of trade sanctions violations in excess of $9.7 billion during 2015, $1.7 billion in 2012, and $649 million in 2010); Resource Center: Civil Penalties & Enforcement Information, OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF TREASURY (last updated Nov. 24, 2015), https://www.treasury.gov/resource center/sanctions/CivPen/Pages/civpen-index2.aspx (showing an average of almost $593 million in civil penalties arising out of Office of Foreign Assets Control enforcement actions from 2009 to 2015).

5 Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

6 Cartel Statistics, EUROPEAN COMM'N, http://ec.europa.eu/ competition/cartels/statistics/statistics.pdf (last updated Oct. 21, 2015).

7 See Carlos R. Rainer & Aubrey J. Stock, Spotting issues before it's too late, NORTON ROSE FULBRIGHT (Mar. 2015), http:// www.nortonrosefulbright.com/us/knowledge/publications/127163/spotting-issues-before-its-too-late (recounting that China's competition authority recently 'levied fines totalling $200 million against auto parts manufacturers').

Multi-jurisdictional offenses and enforcement

There have been multiple, wide-ranging competition enforcement actions in recent years that have demonstrated the potential for duplicative punishments for international antitrust violations.

For example, the Air Cargo investigation—involving an alleged conspiracy among major international airlines to fix prices for air cargo rates[8] – was the subject of enforcement actions in 10 different jurisdictions: the United States, European Union, Australia, Brazil, Canada, Mexico, New Zealand, South Africa, South Korea, and Switzerland.[9] The international auto parts investigations have been pursued by no fewer than seven jurisdictions—the United States, European Union, Australia, Japan, Canada, China, and South Korea.[10]

These multi-jurisdictional investigations have serious multi-jurisdictional consequences. For example, fines arising out of the Air Cargo investigations now total roughly $2.8 billion between the United States and European Commission.[11] Other competition authorities have levied substantial fines as well, totaling over $250 million.[12] Multi-jurisdictional consequences can even extend to multiple authorities within one country. The Department of Justice recently announced that fines arising out of the LIBOR antitrust investigation have reached $9 billion, with fines coming from entities that include the Federal Reserve, the New York State Department of Financial Services, the Commodity Futures Trading Commission, the Office of the Comptroller of the Currency, and foreign authorities.[13]

These facts are illustrative of two key issues. First, a globalised economy combined with global concerns over competition issues means antitrust violations by large multinationals may occur in multiple countries, thus arousing the interest and speculation of multiple governmental authorities.

Second, competition authorities have had limited success in coordinating punishment for competition violations, even when they have attempted to do so. For example, during prosecution of the recent Air Cargo matter, competition authorities in Europe, Australia, and the United States attempted to set fine amounts according to methods that would avoid redundant punishment of airlines for transactions that had anticompetitive effects in two jurisdictions.[14] The methods adopted were inconsistent and, in the recent words of two commentators, 'incapable of solving the underlying overpunishment issue.'[15] Even when it is reasonable for multiple countries to have a hand in punishing antitrust violations, there is still a substantial likelihood that the violations could be over-punished as a result of redundant enforcement.[16]

Effective compliance program as key protection

Adoption of an effective antitrust compliance program is a key protection against suffering the full consequences of antitrust violations. A strong compliance culture with effective compliance training and protocols can have both preventive benefits and post-violation value.

Prevention

The most obvious way that adoption of a strong compliance program can have value is through prevention of antitrust violations in the first place. A compliance program might forestall problems by educating employees and managers about the risks of certain activities, like contact with competitors. A strong compliance program can also be a driving force in ensuring that the culture at a business does not drift towards passivity, accommodation, or acceptance of illegal activities.

Leniency

Even if a compliance program does not succeed in preventing unlawful conduct, it still may allow for early detection of that conduct. As discussed below, one hallmark of a highly effective compliance program is the provision of ways to detect unlawful conduct, such as creating a hotline for persons to report potentially illegal activities or conducting antitrust audits. Early detection gives businesses the option of reporting violations to authorities before a government investigation has been launched or before law enforcement is even aware of any potential problem.

8 Press Release, Dep't of Justice, Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totaling More Than $500 Million for Fixing Prices on Air Cargo Rates (June 26, 2008), http://www.justice.gov/archive/atr/public/press_releases/2008/234435.pdf.

9 John Terzaken & Pieter Huizing, How Much is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels, 27-SPG ANTITRUST 53, 53 (Spring 2013).

10 ABA Section of Antitrust Law, 2013 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 257-60 (2014); Howard W. Fogt,Global Auto Parts Antitrust Probe: Compliance Programs Must Be a Top Priority, 22 No. 3 WESTLAW JOURNAL ANTITRUST 10, at *2 (June 13, 2014).

11 Press Release, European Comm'n, Antitrust: Commission fines 11 air cargo carriers a799 million in price fixing cartel (Nov. 9, 2010), http://europa.eu/rapid/press-release_IP-101487_en.htm?locale=en; Antitrust Div., Dep't of Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, ANTITRUST DIV., DEP'T OF JUSTICE, http://www.justice.gov/ atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (last updated Nov. 18, 2015).

12 See Nick Taylor, et al., Antitrust Alert: Australia Court Rejects Antitrust Challenge to Air Cargo Cartel, Finding 'No Market in Australia', JONES DAY (Nov. 2014), http://www.jonesday.com/antitrust-alert-australia-court-rejects-antitrust-challenge-to-air-cargo-cartel-finding-no-market-in-australia-11-05-2014/.

13 Press Release, Office of Pub. Affairs, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

14 Terzaken & Huizing, supra note 9, at 55.

15 Id.

16 Id.

Leniency programs substantially reward this type of early reporting. The Antitrust Division's Leniency Program, for example, grants immunity from criminal prosecution to the first—and only the first—member of a cartel that notifies the government of the cartel's existence, meets the Division's leniency requirements, and fully cooperates with authorities thereafter.[17] In some instances, cartel members who self-report even after an initial amnesty applicant ('second-in' members) may be eligible for other benefits, which include possibly reducing the scope of affected commerce used to calculate fines, securing a cooperation discount, and obtaining more favorable treatment for culpable executives.[18] Further, 'amnesty plus' benefits may be available, such as where a company is not the first in the door for amnesty in a cartel conspiracy, but may have information about a separate cartel involving a different market, industry, or geographic area. If the company is first-in for the separate conspiracy, it may become eligible for amnesty in the separate matter and could be eligible for additional credits for cooperating in the first conspiracy investigation.

In addition, the Antitrust Criminal Penalty Enhancement and Reform Act, which is complementary of the Division's Leniency program, provides for other potential benefits to encourage cartel defections, incentivising cartel members to race to the Division to put down their 'marker' so they can, among other things, avoid treble damages in follow-on private civil antitrust suits. Over fifty other jurisdictions have variations of leniency programs, including Australia, Brazil, Canada, the European Union, Japan, South Korea, and the United Kingdom.[19] Through leniency, early reporting and cooperation can help avoid millions or even billions of dollars in fines.

Sentencing relief

A strong compliance program may also allow a company to obtain a measure of relief at sentencing or in settlement with competition authorities.

In 2015, the ability to obtain sentencing relief was surprisingly illustrated twice in the United States. The Department of Justice historically has refused to provide any sentencing mitigation credit on the basis of compliance programs in criminal antitrust prosecutions. It has reasoned that the Antitrust Division's leniency program provides ample incentive to adopt a strong compliance program that might 'uncover' violations. A compliance program that failed to 'prevent' an antitrust violation, so the argument goes, was evidently not a program worthy of reward.[20]

Perhaps as some evidence of potential thawing of its position, the Antitrust Division has, however, recommended reduced fines against two entities in the past year on the basis of their compliance efforts. In the prosecutions arising out of the LIBOR investigation, the government recommended that Barclays receive a 'modest' reduction in its fine because of the strength of its compliance efforts after learning of the violation.[21] Similarly, in *United States v Kayaba Industry Co.*, the Division recommended a below-guidelines fine at sentencing for defendant auto-parts manufacturer KYB, which was being prosecuted for a conspiracy to restrain trade in the market for shock absorbers. The Division commended KYB's cooperation with investigators as well as its major post-violation efforts to build a strong compliance program.[22]

Other competition authorities have expressed similar interest in rewarding strong compliance efforts. In 2015, the Canadian Competition Authority published a new version of its 'Corporate Compliance Programs' publication. The guide states that the Competition Bureau will treat a 'credible and effective' corporate compliance program in place at the time of the violation as a 'mitigating factor' when making recommendations regarding sentencing leniency to prosecutors.[23] The French competition authority has also issued a 'framework document' on antitrust compliance programs, stating that a party may receive up to a 10 per cent reduction in its fine for instituting a sufficient compliance program as part of a settlement with the authority.[24]

What type of compliance program will allow a company to obtain these benefits? The Antitrust Division's sentencing memorandum in the KYB

17 See generally Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters at 1, 4-5, ANTI-TRUST DIV., DEP'T OF JUSTICE (Nov. 19, 2008), http://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/ 239583.pdf.

18 Scott D. Hammond, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations at 3-11, 14 (Mar. 29, 2006), http://www.justice.gov/atr/file/518436/download.

19 Scott D. Hammond, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades at 1, 3 (Feb. 25, 2010), http://www.justice.gov/atr/file/518241/download.

20 Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Compliance is a Culture, Not Just a Policy at 8 (Sept. 9, 2014), http://www.justice.gov/atr/file/ 517796/download.

21 Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorneygeneral-brent-snyder-delivers-remarks-sixth-annual-chicago.

22 22 United States Sentencing Mem. & Mot. for Downward Departure at 7-8, *United States v Kayaba Indus. Co.*, Criminal No. 1:15-CR-98 (S.D. Ohio Oct. 5, 2015), ECF No. 21.

23 Competition Bureau, Government of Canada, Corporate Compliance Programs § 3.2.1 (June 3, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s3_0.

24 Autorite´ de la concurrence, French Republic, Framework-Document of 10 February 2012 on Antitrust Compliance Programmes (Feb. 10, 2012), http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

case is instructive. The earmarks of an effective compliance program include:

- A strong educational component, including classroom and one-on-one training for senior management and personnel with jobs that have a high potential for antitrust violations.
- Efforts to ensure the efficacy of this education through the administration of pre- and post-training tests about antitrust laws and risks.
- Prophylactic measures intended to prevent opportunities to commit violations or make people think twice before completing them, such as (1) requiring prior approval for and reporting of contacts with competitors and (2) mandating certification by sales personnel that prices were set independently and that price information was not exchanged with competitors.
- Measures to ensure the prompt reporting of antitrust violations, such as by setting up an anonymous hotline allowing employees to report possible violations of law.[25]
- A strong corporate culture, supported at the top by senior management, that makes antitrust compliance a corporate priority.
- Willingness to punish those responsible for violations through, at the least, demotion.[26]

25 The US Sentencing Guidelines provide guidance on the minimum requirements for an effective antitrust compliance program, including mandatory monitoring and auditing components. See USSC Sentencing Guidelines Manual § 8B2.1 (2014), available at http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8 ('The organization shall take reasonable steps—(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct ...').

26 United States Sentencing Mem. & Mot. for Downward Departure at 7-8, *United States v Kayaba Indus. Co.*, Criminal No. 1:15-CR-98 (S.D. Ohio Oct. 5, 2015), ECF No. 21.

This list demonstrates that the expectations for an antitrust compliance program are rigorous. Along this line, DAAG Snyder has stated publicly that the Antitrust Division will be conservative in handing out sentencing credits on this basis. He remarked that a compliance program will only warrant a sentencing reduction if 'a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense [to] occur.'[27] A nominal improvement on a preexisting program that failed to prevent the violation will not cut it.

Conclusion

Global antitrust enforcement has never been more fierce. The incentives to design and implement an effective antitrust compliance program have never been greater. In light of the increased enforcement and con-verging enforcement trends marked by heightened, international involvement, businesses that fail to augment antitrust compliance as a priority compliance area may needlessly open themselves up to significant consequences.

In the current escalating enforcement environment, antitrust compliance programs require real commitments, both intellectual and financial. The enforcement surge and spectacular fines levied over the past several years for antitrust violations demonstrate that the return on investment for well-developed programs can be huge.

27 Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

For more information contact:

Carlos R Rainer
Partner, Houston
carlos.rainer@nortonrosefulbright.com

Jim Powers
Associate, Houston
jim.powers@nortonrosefulbright.com

Contacts

If you would like further information please contact:

Martin Coleman
Global head of antitrust and competition
Head of antitrust and competition – Brussels
London
Tel +44 20 7444 3347
martin.coleman@nortonrosefulbright.com

Peter Scott
Head of antitrust and competition – London
London
Tel +44 20 7444 3834
peter.scott@nortonrosefulbright.com

Heather Irvine
Head of antitrust and competition – Africa
Johannesburg
Tel +27 11 685 8829
heather.irvine@nortonrosefulbright.com

Layne E Kruse
Head of antitrust and competition – United States
Houston
Tel +1 713 651 5194
layne.kruse@nortonrosefulbright.com

Kevin Ackhurst
Head of antitrust and competition – Canada
Toronto
Tel +1 416 216 3993
kevin.ackhurst@nortonrosefulbright.com

Marc Waha
Head of antitrust and competition – Asia
Hong Kong
Tel +852 3405 2508
marc. waha@nortonrosefulbright.com

Nick McHugh
Head of antitrust and competition – Australia
Sydney
Tel +61 2 9330 8028
nick.mchugh@nortonrosefulbright.com

Luis Ernesto Andueza
Head of antitrust and competition – South America
Caracas
Tel +58 212 276 0007
luis.andueza@nortonrosefulbright.com

Marta Giner Asins
Head of antitrust and competition – France
Paris
Tel +33 1 56 59 52 72
marta.ginerasins@nortonrosefulbright.com

Maxim Kleine
Head of antitrust and competition – Germany
Hamburg
Tel +49 40 970799 180
maxim.kleine@nortonrosefulbright.com

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