Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

NORTON ROSE FULBRIGHT

Cultivate

Food and agribusiness newsletter

Issue 18 | May 2019

In this issue:

Supply chain platforms and anti-trust: new wine, old bottles

Human rights in agricultural supply chains – is the landscape changing?

UK Supreme Court clarifies issues on parent company liability in Lungowe v Vedanta

Agro-Energy? An Italian perspective

What does European court ruling mean to future of gene editing

Cartel investigation in the corn flour market in Mexico

Provincial wine labelling laws trump the right to use a trademark

Consultations open on the UN “zero draft” treaty on business and human rights

© Norton Rose Fulbright LLP BDD12617 EMEA 05/19 Extracts may be copied provided their source is acknowledged.

Editorial

In the 18th issue of *Cultivate* we focus on the global supply chains in the agriculture sector which are being challenged to be more transparent, more environmentally sustainable and to meet ever-expanding regulatory requirements

Our first article looks at the potential for blockchain, and other distributed ledger technologies, to revolutionize supply chain management by improving efficiency and the antitrust issues which can arise from their use. Explore the article for practical solutions for avoiding these antitrust issues.

We then examine recent human rights developments relating to agricultural supply chains. We discuss recent rulings which will have a significant effect on supply chain management in the future.

Continuing the theme of Environmental & Social governance issues in emerging markets, we take an in depth look at the recent landmark judgment from the UK Supreme Court on a claim brought by 1,826 Zambian villagers against a UK-based mining company and its Zambian subsidiary. The ruling could have significant implications for UK-registered companies in the food and agribusiness sector with subsidiaries in other jurisdictions.

Having discussed the decision of European Court of Justice to classify plants developed with CrisprCAS9 as genetically modified in Issue 17, in this issue we provide a detailed analysis on what this could mean for gene editing techniques in the future.

Across the Atlantic, in Mexico, an investigation is currently underway examining whether companies or individuals established cartel arrangements that have adversely affected the corn flour market. If found to be the case, financial stakeholders could be subject to substantial fines and much reduced profits.

Kathy Krug
Tel +1 403 267 9528
kathy.krug@nortonrosefulbright.com

Calendar

July
Chicago, July 22-23, 2019
Agtech Nexus USA

September
Minneapolis, September 9-11, 2019
AG Innovation Showcase

Tokyo, September 12-13, 2019
Global Aginvesting Asia

October
Hawaii, October 18-20, 2019
International Conference on Sustainable Environment and Agriculture

Niagara Falls, October 28-29, 2019
Advancing Women in Agriculture

December
Las Vegas, December 2019
MJ BizCon

We're No 1: Norton Rose Fulbright's Food and Agribusiness practice recognized by Chambers Global

Band 1
Agribusiness, Chambers Global 2019

Supply Chain Platforms and Antitrust: New Wine, Old Bottles

Jay Modrall, Brussels

The potential for new technologies, such as blockchain and other distributed ledger technologies (DLTs), to revolutionize supply chain management has been widely recognized. So too have the antitrust issues that these technologies may raise. Indeed, these new supply chain management technologies are designed to facilitate communication and cooperation, including among competitors. So it comes as no surprise that these activities may raise antitrust issues.

In the labor-intensive area of farming and agriculture, UAVs can provide substantial benefits, depending upon the model and equipment on the UAV

However, the antitrust issues associated with new supply chain management technologies can be exaggerated. One over-heated commentator asked, "Is Blockchain the Death of Antitrust Law?" In fact, the issues raised by the use of DLT and similar technologies are typically well understood and can normally be addressed by seeking antitrust input early.

Separately, antitrust authorities in many countries are increasingly interested in online platforms' collection and use of data. While most of this attention is directed at consumer platforms such as Amazon and Facebook, initiatives to promote data access may also catch supply chain management platforms.

The specific issues in DLT-related projects, and the best ways to address them, vary greatly from case to case. In general, however, these issues stem from four factors that are common to DLT-related supply chain management platforms: the formation of joint ventures (JVs) to develop and operate the platform; the need to share confidential information, which may be competitively sensitive; the criteria governing who may use the platform and on what terms; and these platforms' collection and use of data. It may be difficult to draw a clear line between these categories; for example, JV parties must often share information to design or operate the JV. For the sake of convenience, however, this article breaks down the most common antitrust issues associated with DLT-related supply chain management platforms under these four headings and offers suggestions on how to deal with them.

Supply Chain Management Joint Ventures

As mentioned, DLT-related projects commonly involve cooperation among multiple companies to develop the DLT platform, to operate it, or both. Whether or not these activities involve a formal JV structure, such cooperative relationships may raise antitrust issues. The objectives and structure of the platform determine the number and identity of the participants, as well as the related antitrust issues.

Single-manufacturer platforms

At one extreme, a single company manufacturing and selling a range of products may want to develop and operate a stand-alone platform to manage its own supply chain. The manufacturer will normally need to cooperate with a technology provider to develop the DLT platform and to cooperate with its suppliers and customers to operate it. Since this type of cooperation does not involve cooperation among competitors, however, it is unlikely to raise antitrust issues. Exceptions could arise if the manufacturer wished to introduce unusual limitations on the technology provider (e.g. non-competes) or suppliers and customers (e.g. long-term or exclusive commitments or requirements to purchase unrelated goods or services).

Multi-manufacturer platforms

At the other extreme, a group of manufacturers may want to cooperate to develop and operate a DLT platform to serve as an industry utility allowing multiple manufacturers to manage their supply chains on a single platform. In this scenario, antitrust issues in the development and the operation of the platform are likely to be much more significant.

At the development stage, the selection and engagement of a technology provider is unlikely to raise antitrust concerns, although such concerns may arise where the platform is or is likely to become an industry standard and there is a risk of bias in the selection process. More commonly, antitrust concerns will arise through the cooperation among competitors to design the platform. This process will inevitably involve meetings of competitors and discussions on the functionalities and pricing the platform will offer. Without precautions, such discussions may turn to the participants' underlying, competing activities and/or their participation in potentially competing platform projects. Thus, participation in multilateral supply chain management JVs creates a risk of competitors sharing sensitive information (see below).

At the operation stage, a common platform allowing multiple manufacturers to manage supply chains with multiple suppliers and customers clearly has the potential to generate efficiencies. However, any cooperation among competitors must be scrutinized carefully from an antitrust perspective. Platforms should be designed to mitigate potential harms, and the parties should be able to demonstrate that the expected efficiencies outweigh any residual harm.

In particular, multilateral platforms must be carefully designed to ensure that competitors do not have access to competitively sensitive information, especially pricing information that could be used to jointly set prices (price fixing) or to alert competitors of future pricing plans (price signaling). The platform should also be designed to ensure that it does not become a vehicle for sharing competitively sensitive information indirectly via suppliers or customers (hub-and-spoke). In a DLT-based platform, these issues can be addressed through careful review of the type of information stored on the platform and the permissioning rules that control who can see it.

Merger control

Where a supply chain management platform is jointly owned, the parties must also consider merger filing requirements. In general, whether merger filing requirements are triggered depends on whether the project results in a notifiable transaction, such as the formation of a formal JV, and whether the relevant parties meet the relevant thresholds. Thresholds are normally based on revenues, market shares and asset values. In some jurisdictions, these thresholds can be met by the JV participants even if the JV itself is a greenfield venture with de minimis revenues and assets. The formation of a supply-chain management platform is most likely to be notifiable where the founders hold significant equity shares and/or are directly involved in the platform's management. If a supply chain management platform is well designed to avoid antitrust issues, obtaining merger approval will normally be routine. It is important, however, to identify potential filing requirements early in the process to avoid delays.

Summary

DLT-related projects to manage supply chains typically involve cooperation among multiple entities to design the platform, to operate it, or both. Such cooperation normally raises significant antitrust issues only where two or more competitors are involved. Any JV among competitors must be undertaken with care to avoid breaching antitrust rules. These rules condone JVs among competitors that generate efficiencies that could not be offered by competitors operating alone and outweigh potential competitive harms. DLT-related ventures to manage supply chains have the potential to generate significant efficiencies and are likely to be permissible under antitrust rules, provided that antitrust pitfalls are managed properly, in particular as regards information sharing and merger filing requirements.

Information Sharing in Supply Chain Management Platforms

At their heart, DLTs and related technologies are means of recording and sharing information. When sellers and purchasers share information relating to their own transactions, antitrust issues do not normally arise. Antitrust issues can arise, however, when suppliers and customers share information relating to their respective competitors. Antitrust issues are even more likely to arise when competing suppliers and customers share information directly.

Indeed, antitrust authorities have long identified the sharing of competitively sensitive information as illegal. While information exchange is a common feature of many competitive markets and can make markets more efficient, information exchanges can violate antitrust laws when they enable companies to be aware of their competitors' market strategies. Information exchanges among competitors can also constitute, or be used to implement, cartels. The anti-competitive effects of information exchanges depend on factors such as the concentration, transparency, stability, symmetry, and complexity of the markets concerned, as well

as on the type of information that is exchanged. The more granular, recent and directly related to competitive terms and conditions, the more likely information is to be competitively sensitive. Examples of particularly sensitive information include recent information on customers and pricing, future plans for bids, prices and other strategic initiatives.

In the context of supply chain management platforms, information sharing concerns arise in different ways depending on the structure and purpose of the platform. In platforms operated by a single manufacturer, information sharing issues are less likely to arise, but the platform should be designed so that suppliers and customers using the platform cannot access one another's competitively sensitive information.

In multi-party platforms, information sharing issues are likely to arise both in the design and operation stage, but these issues can typically be managed by standard precautions. Participants in a platform's design should enter into confidentiality agreements, limit the scope of discussions and information exchanged to the minimum required, and take customary precautions such as ensuring that meetings stick to pre-agreed agendas and keeping minutes of the discussion. If competitively sensitive information must be exchanged, a clean team should be formed to prevent any spillover effects on competition among the participants.

If the development work is successful and the project proceeds, customary precautions should also be taken in the platform's governance and operation. For example, the platform should adopt an antitrust policy and do regular antitrust training, and shareholder employees serving on the platform's board or seconded to the platform should enter into confidentiality agreements.

Since supply chain management platforms are specifically designed to process confidential information of many parties, including not only manufacturers who may compete with one another but also competing suppliers and customers, special care is required in platforms' operational design. Commentators sometimes assert that information exchange problems in the use of DLTs are unavoidable, because the information they record is available to all, including competitors. This is misleading in at least two key respects: first, not all information in a DLT platform is likely to be competitively sensitive; and, second, antitrust concerns can be managed by ensuring that a platform's permissioning rules prevent the sharing of competitively sensitive information. It is thus critical to the operation of a DLT-based supply chain management for antitrust lawyers to be involved early to understand what information is to be processed on the platform and to ensure that the appropriate permissions are installed to avoid illegal information sharing.

Operation of Supply Chain Management Platforms

As mentioned, the terms and conditions for suppliers and customers to use supply chain management platforms may raise antitrust issues, but these issues can normally be addressed by careful planning. Again, a platform operated by a single manufacturer is unlikely to raise antitrust issues (assuming that the manufacturer does not have a "dominant position" or "market power" for antitrust purposes).

In a platform operated by multiple manufacturers, antitrust issues may arise in a variety of ways, including the platform's access rules, pricing and other terms and conditions (as well as the information exchange concerns discussed above). The significance of these issues may depend on the platform's importance to suppliers' and customers' businesses, which may evolve over time. A supply chain management platform that starts small and has minimal competitive significance may evolve into an essential facility for suppliers and customers subject to more stringent constraints.

One area of potential antitrust concern is access conditions. Access rules that exclude potentially relevant suppliers and customers may raise concerns if such exclusion cannot be justified based on objective criteria and/or exclusion is likely to harm their ability to compete. Conversely, platforms that are accessible to all relevant suppliers and customers based on objective criteria are unlikely to raise antitrust issues.

Similar considerations apply to the pricing and other terms and conditions available to manufacturers, suppliers and customers using the platform. Absent a dominant position or market power, a single manufacturer is generally free to set its own terms and conditions for use of its platform. A platform open to multiple manufacturers and their suppliers and customers is more likely to raise issues. Particular concerns may arise if manufacturers who are also platform owners receive more favourable terms and conditions, or if the platform charges suppliers and customers for its use and such costs are an important part of suppliers' and customers' competitiveness.

In general, issues are least likely to arise in a multi-manufacturer platform where the manufacturers themselves bear the platform's cost of operation and all manufacturer users receive the same terms and conditions regardless of their equity participation.

Supply Chain Management Platforms and Data

As mentioned, antitrust authorities are increasingly concerned about online platforms' collection and use of data and whether their proprietary data sets can create barriers to entry or expansion by others. Some authorities have suggested that platforms could be required to share their data and/or to ensure the interoperability of their data sets to facilitate completion. While these concerns are typically focused on consumer-facing platforms, proposals to mandate data sharing or interoperability through enforcement procedures or new regulations are sometimes broader.

Concerns about data sharing or interoperability in supply chain management platforms are largely speculative, for now. As a general matter, however, such concerns are less likely to arise in relation to a proprietary platform operated by a single manufacturer than in a multi-manufacturer platform collecting data from a larger population of manufacturers, suppliers and customers. In designing such multi-manufacturer platforms, it is important to consider what data the platform will store, and how such data will be made available to others (after anonymization or aggregation to avoid sharing competitively sensitive information), if at all. Making such data available to all interested parties on non-discriminatory terms would likely suffice to preempt any complaints that may arise if the platform becomes a repository of market-critical information.

Conclusion

The introduction of DLT and similar technologies has the potential to revolutionize supply chain management through the creation of supply chain management platforms. Notwithstanding sometimes emotional commentary about the antitrust issues raised by online platforms in general and DLT-related technologies more specifically, these issues are generally well understood and can be managed by careful planning.

In general, supply chain management platforms designed and operated by a single manufacturer are unlikely to raise antitrust issues, provided care is taken to ensure that suppliers and customers cannot access one another's competitively sensitive information.

The design and operation of multi-manufacturer platforms is more likely to raise concerns. In general, the more accessible such platforms are, both to other manufacturers and suppliers and customers, the less significant such concerns are likely to be. Again, however, it will be critical to avoid sharing competitively sensitive information both at the design and development stage and in the governance and operation of the platform. In the coming years, antitrust authorities can be expected to look more closely at the data collected by such platforms and how it is used. Even after aggregation and anonymization, the data generated by some supply chain management platforms may prove to be an important competitive resource. In such cases, platforms can likely preempt antitrust concerns by making any such data available (if at all) on non-discriminatory terms.

Human rights in agricultural supply chains – is the landscape changing?

Milana Chamberlain, London

Food and agribusiness is a sector recognized as presenting some of the more serious human rights risks, a good proportion of which occur in the supply chain. Issues such as slavery in the prawn-export industry in South East Asia, and child labor on West African cocoa plantations are well known, and have been the subject of significant stakeholder attention for a number of years. In this article we review recent legislative and other developments incentivizing the continued development by agribusiness companies of risk management systems and processes, particularly in their supply chains.

Reputational pressure

Historically, where companies have disclosed information about their supply chains and sourcing practices, this has principally been driven by reputational concerns and pressure by Non-Governmental Organisations (NGOs). In the tea industry for instance, the *Who Picked My Tea?* campaign was started by the European Union, Fairtrade International and the World Trade Organisation as a result of concerns about the poor working conditions and low wages in the Indian region of Assam, which supplies tea to many major British tea brands.

Within two months, the campaign collected more than 7,000 online signatures from consumers asking the six largest British tea brands by retail market share to publish lists of their suppliers. In a little over a year, the campaign has prompted five of the six largest British tea producers, including Unilever and Twinings, to publish their supplier lists. The campaign recently named Typhoo as the only major UK tea marketer that has not published its supplier list, a move which is likely to mount pressure on the company.

The International Cocoa Initiative is a similar campaign which partners with cocoa industry companies and NGOs to implement a Child Labor Monitoring and Remediation system. Both initiatives rely on a desire by companies to avoid the reputational damage which may result from failing to proactively engage with them.

Legislation to promote transparency

The passage of the UK Modern Slavery Act in 2015 brought mandatory reporting obligations on modern slavery and human trafficking issues into the UK's legal regime. The Act requires certain commercial organisations to publish annual statements describing, amongst other things, the organisation's business and its supply chains, its modern slavery and human trafficking policies, due diligence processes, areas where there is a risk of modern slavery and human trafficking taking place and steps they have taken to address these risks. To prepare a robust Modern Slavery Act statement, appropriate action needs to be taken by the organization during each reporting year.

The Modern Slavery Act has been criticized as ineffective, in part because compliance is difficult to monitor due to a lack of a central database (which would facilitate the comparison of companies' statements by investors and civil society), and because of weak enforcement measures. In the event of a failure to comply, companies face an injunction compelling the publication of a statement.

The Government is considering the effectiveness of the Act. As part of the Independent Review of the Modern Slavery Act announced by the Home Secretary at the request of the Prime Minister which began in July 2018, in January 2019 Frank Field MP, Maria Miller MP and Baroness Butler-Sloss GBE published their second interim report.

Various measures to strengthen the effectiveness of the Modern Slavery Act are being proposed in the report including

- Setting up a central repository to which companies are required to upload their statements and which should be easily accessible to the public.
- Making reporting on the six voluntary areas set out in the transparency section of the Modern Slavery Act mandatory. If a company does not report against any of the headings, it should be required to explain why.
- Introducing laws which would enable more effective enforcement. This would involve initial warnings, the potential for fines (calculated as a percentage of turnover) and even the possibility of director disqualification. It is proposed that sanctions be introduced gradually over the next few years so as to give companies time to adapt to the changes.

The Home Office has also been writing to companies (including FTSE 250 listed entities) that have not published a Modern Slavery Act statement, in an effort to demonstrate the Government's willingness to monitor compliance and enforce the Act. These letters threaten the publication of a list of non-compliant companies.

The trend towards encouraging supply chain transparency through legislation is increasingly global. The UK Modern Slavery Act was preceded by the California Transparency in Supply Chains Act in the US, and has since been followed by two pieces of Australian legislation in 2018: first the New South Wales Modern Slavery Act, and later the Commonwealth Modern Slavery Act. The Commonwealth Modern Slavery Act is broadly similar to the UK Act, but requires mandatory reporting on all the prescribed topics, and the filing of the statements in a centralized government database. Modern Slavery Bills have also been introduced in the Canadian and Hong Kong legislatures. See the case study overleaf for further detail on Canada's moves to implement this legislation. France has adopted their supply chain management regulation in the form of "Loi de Vigilance", due diligence of corporations and main contractors which, through the obligation to prepare a surveillance plan, aims at evaluation, prevention, monitoring and decrease of social and environmental risks through the supply chains of companies within the scope of the legislation. Similar legislation already exists in draft in Germany. Governments are joining in the transparency initiative and the space for operations without appropriate supply chain risk mitigation is diminishing.

Investors and financial institutions

Environmental Social and Governance (ESG) standards have been adopted by an increasing number of investors, reflecting a growing recognition that ESG issues can have an effect on the profitability of companies. Prominent institutional investors have adopted standards such as the United Nations Principles for Responsible Investment (which has around 2,000 signatories) requiring that ESG issues be taken into account in any investment decision-making process. In addition, asset investors are increasingly using their leverage as shareholders of investee companies to influence the implementation of long-term ESG strategies and standards.

In the project finance area, 97 financial institutions have signed up to the Equator Principles, a risk-management framework for the management of environmental and social risks. Borrowers are incentivised to apply the standards in the Equator Principles to secure financing from Equator Principles banks. The Equator Principles are currently undergoing a review, with a new version due to be launched in the autumn of 2019. "Social Impact and human rights" was announced as a principal topic for review.

Financial institutions continue to assess their approach to environmental and social issues in relation to other financial products and services, including (for example) when conducting due diligence in connection with securities underwriting.

Litigation

An important litigation trend worth mentioning are the developments in parent company responsibility for acts of its subsidiaries through the courts in developed countries. This would be relevant to the model of various agribusiness companies with subsidiaries abroad.

Some recent examples include:

AAA v Unilever

A well-known case in the agribusiness sector was that of *AAA v Unilever*. Employees and former employees of Unilever Tea Kenya Limited (UTKL) and residents on a tea plantation run by UTKL in Kenya brought a claim in England against Unilever Plc and UTKL in relation to harm suffered by them in the hands of marauding mobs on the tea plantation during inter-tribal violence during the 2007 presidential election. The Court of Appeal upheld the High Court's decision that there was no good arguable claim that Unilever owed a duty of care to individuals affected by violence at a tea plantation operated by UKTL.

Lungowe v Vedanta

The outcome was different in the recent decision in the case of *Lungowe v Vedanta*. There a group of 1,826 Zambians sued UK mining company Vedanta Resources and its Zambian subsidiary KCM in the UK for damages for allegedly discharging waste from the Nchanga copper mine owned and operated by KCM into their water supply. On 10 April 2019, the UK Supreme Court ruled that though Zambia was the most appropriate forum for the claims, the claimants would be allowed to sue Vedanta in the UK, because the lack of legal aid and conditional fee arrangements would mean the claimants would not be able to hire sufficiently experienced legal teams to conduct such large complex litigation.

This case relates to a different industry and so far the result is that the UK courts accepted jurisdiction over the claim. The substance of the claim will be argued later. However, the importance of access by the affected rights-holders to a developed judicial forum which is making a fair trial possible cannot be under-estimated. This case is explored in further detail in the following pages.

Jam v IFC

The hardening legal ESG risk is relevant not only to companies in the agribusiness industry. It has been recognised that law claims might potentially be brought against financial institutions as well. An important case followed by many interesting parties was that of Jam v IFC. Indian fishermen were suing the IFC for damage caused by a coal-fired power plant built in Gujarat by Coastal Gujarat Power Limited, an Indian company, and co-financed by the IFC. The IFC has raised its immunity in defence to the claim. In April 2019 The Supreme Court of the United States issued a judgement confirming that the International Organizations Immunities Act of 1945 affords international organizations the same immunity from suit that foreign governments enjoy today under the Foreign Sovereign Immunities Act of 1976. In this case this means that the IFC is not immune from claims in respect of its commercial dealings. It remains to be seen whether the case will continue.

A historic objection raised in relation to the IFC financing was in the agribusiness sector. According to Thomson Reuters Foundation, "A World Bank investigation into a tea plantation project in India that it jointly finances with tea giant Tata Global Beverages has found that it has failed to tackle alleged abuses of impoverished workers ... "

James Finlay

The most recent case highlighting the need for companies in the sector to periodically review their working practices involves James Finlay. According to publicly available information, James Finlay (Kenya) Limited, a Scottish company, is being sued by seven Kenyan tea pickers for poor working conditions including a 6:30am to 6:00pm working day without lunch or tea breaks, and being forced to carry 28kg equipment over long distances, leading to severe pain. The cases have been brought in the All-Scotland Sheriff's Personal Injury Court. The Sheriff, the judge in this case, ordered a team of experts including an ergonomist, an orthopaedic surgeon, a Queen's Counsel, and legal representatives, to, amongst other steps, "observe workers picking tea, measure distances between plantations and weighing areas, and the medical facilities available to James Finlays' employees," and to take pictures and videos of of these for use as evidence in the trial.

This case evidences greater awareness of their rights by workers in the agribusiness industry and their readiness to enforce such rights in courts where they could expect a fair trial as well as the seriousness and thoroughness with which the courts are addressing human rights issues.

Human Rights Due Diligence as human rights risk-management system

By conducting Human Rights Due Diligence, companies can proactively identify and manage inherent legal and reputational risks in their operations and supply chains before they trigger negative and expensive outcomes. Our study into human rights due diligence in supply chains carried out by our global ESG team together with the British Institute of International and Comparative Law (https://www.biicl.org/) demonstrates that mitigation of risks within the framework of achieving commercial goals of any organization is the most potent commercial strategy.

Case Study: Modern slavery – Canada moves closer to supply chain legislation

More draft legislation is set to be tabled in Parliament imposing obligations on Canadian companies' supply chains. On April 4, the All-Party Parliamentary Group to End Modern Slavery and Human Trafficking announced the completion of the draft Transparency In Supply Chains Act (TSCA or Bill), which is set to be tabled shortly in the Senate.

While a full draft of the TSCA is not yet available, Canadian businesses should be aware of and prepared for potential reporting and compliance obligations for modern slavery and human trafficking in supply chains that may come if the TSCA ultimately achieves royal assent. A definition of modern slavery under the TSCA has not yet been disclosed, but it will likely capture the use of forced labour, child labour, and human trafficking in overseas business operations.

The proposed TSCA provides for four mechanisms to combat modern slavery: (1) a reporting requirement for qualifying entities; (2) a duty of care for all businesses that meet an annual turnover threshold; (3) the creation of an Ombudsperson and Compliance Committee; and (4) mechanisms to receive and investigate disclosures of modern slavery from whistleblowers.

Key provisions

At a high level, the TSCA will impose obligations on Canadian businesses to actively take steps to prevent the use of modern slavery in their overseas supply chains. The Bill will create reporting obligations on qualifying entities, including completion of a supply chain questionnaire on a company's policies and procedures related to forced labour, child labour, and human trafficking.

The proposed TSCA also aims to establish a duty of care for all businesses meeting a regulated annual turnover threshold. The duty of care provisions will establish a legal responsibility to take reasonable steps to prevent the use of modern slavery in a business's overseas operations.

The Bill will create an Ombudsperson and Compliance Committee. In doing so, the TSCA envisions that the mandate of the Canadian Ombudsperson for Responsible Enterprise, which was announced in early 2018, could be expanded to capture the ombudsperson responsibilities as contemplated in the TSCA.

The TSCA will also create mechanisms to permit investigating reports of modern slavery, including from whistleblowers, as well as enforcing the reporting obligations and legislated duty of care, discussed above.

Implications for Canadian business

Although the TSCA has not yet been tabled in the Senate and therefore many details are still forthcoming, it follows the tabling of a similar private member's bill aimed to tackle modern slavery, as well as the Government of Canada's announcement in February 2019 that it will consult on bringing forward supply chain reporting legislation. Modern slavery and supply chain reporting is currently high on the legislative agenda and has a degree of cross-party support.

Whatever legislation moves forward, Canadian companies should be alive to the potential impact on their businesses, especially if their operations or supply chains encompass developing countries. A risk assessment and review of company policies and procedures as well as training and contractual arrangements with suppliers may be prudent in light of the TSCA and its broad duty of care, reporting, investigation and enforcement mechanisms for those who meet the threshold under the Bill.

Norton Rose Fulbright will be closely following these legislative developments and will provide a further update and outline of the TSCA once it is available for review.

The authors would like to thank Meaghan Farrell, articling student, for her assistance in preparing this legal update.

UK Supreme Court clarifies issues on parent company liability in *Lungowe v Vedanta*

Ruth Cowley, Holly Stebbing, Stuart Neely and Maria Kennedy, London

A landmark judgment from the UK Supreme Court on a claim brought by 1,826 Zambian villagers against a UK-based mining company and its Zambian subsidiary could have significant implications for UK-registered companies in the food and agribusiness sector with subsidiaries in other jurisdictions.

Residents of the Zambian city of Chingola brought proceedings in the English courts against Vedanta Resources Plc (Vedanta), a UK incorporated parent company, and Konkola Copper Mines Plc (KCM), its Zambian subsidiary, claiming that waste discharged from the Nchanga copper mine - owned and operated by KCM - had polluted the local waterways, causing personal injury to the local residents, as well as damage to property and loss of income. The claims are founded in negligence, although the allegations also relate to breaches of applicable Zambian environmental laws.

Both Vedanta and KCM challenged jurisdiction.

In 2016, the High Court held that the claimants could bring their case in England, despite the fact that the alleged tort and harm occurred in Zambia, where both the claimants and KCM are domiciled. This decision was upheld on appeal by the Court of Appeal in October 2017.

This week, the Supreme Court has unanimously dismissed a further appeal by the defendants, upholding the Court of Appeal's ruling in all but one respect.

Issues for the Supreme Court

In considering the appeal, the Supreme Court addressed the following issues

1. Whether there had been an abuse of EU law by the claimants in relying on Article 4 of the Brussels Regulation Recast to establish jurisdiction over Vedanta as anchor defendant for the purpose of attracting the English courts' jurisdiction over the claim against KCM, "the real targets of the claim".
2. Whether the claimants' pleaded case and supporting evidence disclosed no real triable issue against Vedanta
3. Whether England is the proper place in which to bring the claims.
4. Even if Zambia would otherwise be the proper place, whether there was a real risk that the claimants would not obtain access to substantial justice in Zambia.

01 | No abuse of EU law

The majority of the Court of Appeal followed existing authority (*Owusu v Jackson and Others*, C-281/02[1]) that the court of an EU member state cannot decline jurisdiction where the defendant is a company domiciled in that member state (in this case, the UK). In delivering the Supreme Court's unanimous judgment, Lord Briggs recognised it would be an abuse of this rule[2] to allow claimants to sue an English domiciled *"anchor"* defendant solely to pursue a foreign co-defendant (a *"real"* target) in the English courts but that this exception should be applied strictly. Both the High Court and the Court of Appeal found on the facts that the claimants had a bona fide claim and a genuine intention to seek a remedy in damages against Vedanta, even though establishing the English courts' jurisdiction over KCM was also a key factor in their decision to litigate in England.

This was a sufficient basis for finding that there was no abuse of EU law. The Supreme Court found no need to refer to the Court of Justice for the European Union. In reaching the conclusion that the claimants intended to pursue a genuine claim against Vedanta, the lower courts considered on a summary basis evidence put forward by the claimants that KCM may be unable to pay a judgment debt. Consistent with its usual practice

1 This case concerned Article 2 of the Brussels Convention (the equivalent provision in the predecessor legal instrument to the Brussels Regulation Recast).
2 In Article 4 of the Brussels Regulation Recast.

the Supreme Court declined to revisit these factual findings, having found no error of law.

02 | Real issue against Vedanta

The Supreme Court then turned to assess whether the lower courts had erred in determining that there was a real triable issue against Vedanta. Given the substance of the claim, the key question was whether Vedanta had sufficiently intervened in the management of the mine owned by KCM such that it assumed a duty of care to the claimants and/or to establish statutory liability under applicable Zambian environmental, mining and health laws.

Although it was common ground between the parties that the defendants' liability would be assessed under Zambian law, the extent of Vedanta's involvement in the operation of KCM's mine was a factual issue relevant to both the negligence and statutory liability claims. In this regard, the lower courts held (on a summary assessment) that it was arguable Vedanta did owe a duty of care to the claimants given that it had:

- Published a sustainability report which emphasised how the Board of the parent company had oversight over its subsidiaries.
- Entered into a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training.
- Provided health, safety and environmental training across its group companies.
- Provided financial support to KCM.
- Released various public statements emphasizing its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure.
- Exercised control over KCM, as evidenced by a former employee.

While jurisdictional challenges relating to "real triable issues" invariably involve a summary assessment of the issues, on appeal the defendants suggested that the claimants' case raised a *"novel and controversial extension of the boundaries of the tort of negligence"*, and that, accordingly, a more detailed analysis of the claimants' case ought to have been undertaken. The Supreme Court disagreed, holding that "there is nothing special or conclusive about the bare parent/ subsidiary relationship ... the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all". In this respect, Lord Briggs commended the summary by Sales LJ in *AAA v Unilever plc* [2018] EWCA Civ 1532, para 36 (another challenge to jurisdiction on similar issues) that "A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claim are satisfied in the particular case". On that basis, the lower courts had applied the law correctly, and the Supreme Court refused to revisit the lower courts' factual findings on a triable issue.

While this case was limited to the issue of jurisdiction, Lord Briggs made a number of interesting comments on the substantive issue of parent company liability which will be before the court for determination when this matter eventually goes to trial.

He observed that that the test for duty of care in *Caparo Industries plc v Dickman* [1990] 2 AC 605[3] was not necessarily the starting point in establishing whether a duty of care is owed by a parent company as this was not a *"novel category of common law negligence liability"*, but rather had already been considered in previous cases.

In relation to Sales LJ's finding in *Unilever* that cases where the parent company might incur a duty of care to third parties harmed by the activities of a subsidiary would usually fall into two basic types: (i) where the parent has effectively taken over management of the subsidiary's actions and (ii) where the parent has given relevant advice to the subsidiary about how it should manage a risk, Lord Briggs said that, in his view, "there is no limit to the models of management and control which may be put in place within a multinational group of companies". Similarly he rejected the submission that there was any general limiting principle that a parent company could never incur a duty of care merely by issuing group-wide policies and guidelines and expecting the subsidiary to comply. These comments will no doubt be of concern to multinationals wishing to understand in exactly what circumstances a parent company might attract liability for its subsidiaries' activities.

Lord Brigg's commentary will no doubt play into how the High Court will assess the question of duty of care in the trial on the substantive issues in this case.

3 The test being: (i) whether there is sufficient proximity between the parties to impose a duty; (ii) whether the harm is reasonably foreseeable as a result of the defendant's conduct; and (iii) whether it's fair, just and reasonable to impose liability.

03 | England as the proper place

While the lower courts concluded that parallel proceedings against a UK company in the English courts and a Zambian company in the Zambian courts would be unthinkable, making England the proper place for the claims against both defendants (given the similarity of facts and legal principles at issue), the Supreme Court took a different view.

Specifically, the Court said it would have been open to the claimants to either sue both companies in Zambia (as Vedanta had agreed to submit to the jurisdiction of the Zambian courts) or to sue Vedanta in England and KCM in Zambia, recognising that the risk of irreconcilable judgments *"mainly concerns the claimants"*. In reaching this view, the Court referenced Article 8 of the Brussels Recast Regulation, which gives claimants in intra-EU disputes the choice (but not the obligation) to consolidate proceedings in order to avoid the risk of irreconcilable judgments, and concluded that the same principle should apply where the claimants are domiciled outside the EU (as in this case).

04 | Substantial justice in Zambia

The Supreme Court acknowledged that most reasonable observers would conclude that Zambia would, in the ordinary course, be the proper place for the proceedings, given the location of the claimants, the alleged damage, the evidence and KCM's personnel. The Zambian courts were also equipped to interpret the Zambian laws which would be applied in the case.

However, following the lower courts, the Supreme Court was persuaded by two primary factors in concluding that claimants would be denied access to justice if they were not permitted to serve English proceedings on KCM out of jurisdiction. First, the claimants were living in poverty, could not obtain legal aid and would be prohibited from entering into conditional fee agreements under Zambian law. Secondly, the claimants would be unable to procure the services of a legal team in Zambia with sufficient experience to effectively manage litigation of this scale and complexity.

This was, in fact, the deciding factor for the Supreme Court in dismissing the defendants' appeal. Notwithstanding that it found for the claimants on issues (1), (2) and (4), the Court confirmed that, were it not for the claimants' inability to access substantial justice in Zambia, it would have allowed the appeal.

Implications

This case has obvious implications for UK-registered companies with international subsidiaries, in all aspects of the natural resources sector, including farming and food production.

Third party liability

In 2018, two similar cases were heard by the Court of the Appeal. Like *Lungowe*, the cases concerned the English courts' jurisdiction for hearing claims brought by non-UK claimants against UK companies and their non-UK subsidiaries for acts taking place outside abroad. These cases were *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 and the Unilever case cited above.

In both cases, the Court of Appeal concluded that the English courts did not have jurisdiction to hear the claims against the defendants (by contrast with *Lungowe*). We understand that both sets of claimants have applied for permission to appeal to the Supreme Court but the decision on permission in both cases was suspended pending the judgment in *Lungowe*.

The trial of the substantive issues has not yet been listed but will be eagerly awaited. In the meantime, the Supreme Court's judgment in *Lungowe* highlights the need for multinational companies to be aware of the possibility that non-UK claimants may be able to bring claims against them in the English courts where they have an English parent company.

Jurisdiction challenges

The Supreme Court also took the opportunity to repeat that appeals on matters of jurisdiction should be kept to a minimum and that parties should not lose sight of the requirement for proportionality when presenting their cases. Citing Lord Templeman's judgment in *Spiliada Maritime Corpn v Cansulex Ltd ("the Spiliada")* [1987] AC 460, 465, the Court stated that *"[a]n appeal should be rare and the appellate court should be slow to interfere."* Given this stance, it is perhaps now less likely that permission to appeal to the Supreme Court will be granted in the *Okpabi* and *Unilever* cases, referenced above.

Agro-Energy? An Italian Perspective

Ginevra Biadico, Milan

A recent decision by the Regional Administrative Court of Sardinia promotes the use of agricultural land for the construction of renewable energy plants, while keeping intact numerous safeguards designed to preserve local agro-food traditions, biodiversity, cultural heritage and the rural landscape.

When contemplating the development of a renewable project on agricultural land in Italy, developers will need to be aware of this decision and take certain precautions to ensure that the required land cultivation activity is not overlooked.

Facts about the case

In October 2010 Company X was granted the authorisation (autorizzazione unica) to build and operate solar photovoltaic (PV) plants on the top of the roofs of greenhouses located in the Municipality of Bonnanaro, Province of Sassari.

In June 2017 the Region of Sardinia revoked the authorization on the grounds that it was granted to Company X on the basis of Company X being classified as an "agricultural entrepreneur." According to the Region, Company X lost its classification as an "agricultural entrepreneur" when it licensed out to a third party all work relating to the cultivation of the land on which the greenhouses were built.

Company X filed an appeal with the competent Regional Administrative Court of Sardinia to obtain an annulment of the revocation on procedural and substantive grounds.

From a substantive perspective, Company X (the plaintiff) cited Article 2135 of the Italian Civil Code and Article 1 paragraph 423 of Law 266/2005, which provide, among other things, that:

1. The classification as an "agricultural entrepreneur" may be attributed to any natural or legal person (i.e. company) engaged in land cultivation, livestock farming ... and "ancillary activities".
2. The production and sale of energy from photovoltaic sources (up to 260,000kWh per year) may be considered as "ancillary" to agrarian activity.

Decision of the Regional Administrative Court of Sardinia

On February 4, 2019 the Regional Administrative Court of Sardinia decided in favour of the plaintiff, Company X, and annulled the revocation order issued by the Region of Sardinia.

The Court stated that Company X is correctly classified as an "agricultural entrepreneur" even though the only activity directly carried out by Company X is the production of renewable energy using solar panels situated on the rooftops of greenhouses. The Court found irrelevant the fact that Company X had licensed a third party to do the agricultural work on the land on which the greenhouses were situated.

According to the Court, the significant fact is that the land in question is actually being cultivated; in this case, the holder of the authorization is the indirect cultivator of the land, which allows it to continue to have its classification as an "agricultural entrepreneur."

Comment

The decision of the Regional Administrative Court of Sardinia clearly seeks to encourage the production of energy from renewable energy sources. This pro-green industry focus is nevertheless balanced by certain safeguards which exist to protect the integrity of local agro-food traditions, biodiversity, cultural heritage and the rural landscape.

For example, with regard to projects involving placing photovoltaic panels on the roofs of greenhouses, or building renewable energy plants fueled by biomass or biogas, Italian laws ensure that the agricultural aspect of the project must be genuine. Certain Regions have even introduced special requirements for such projects, such as

a minimum threshold of agricultural production to be met as compared to the production of energy, or for the submission of business cases to demonstrate the effective need for the energy side of the project.

Conclusion

When contemplating a renewable project in traditionally agro-producing regions of Italy, whether it be photovoltaic panels on greenhouses or plants fuelled by biomass or biogas near production sites, sponsors and investors will need to bear the court's ruling in mind.

For a project sponsor/authorization holder to protect their status as an "agricultural entrepreneur," cultivation activities may be conducted directly or by third party companies through licensing arrangements, but the holder of the authorization for the project must have the requisite land-use rights and, in the case of biomass or biogas plants, must be able to demonstrate the availability of additional plots of land where cultivation activities may be performed.

At the heart of the matter is that the land in question continues to be cultivated, while the renewable energy production activities go on.

What are the consequences of the CRISPR/Cas9 ruling of the CJEU? – the Court of Justice of the European Union keeps gene editing techniques at bay

Klaus von Gierke, Ettje Trauernicht & Notash Taheri , Hamburg

Following on from Issue 17 of Cultivate we continue our examination of the CRISPR/Cas9 ruling and what it means for gene editing techniques in the future.

By its ruling of 25 July 2018 (C-528/16) the Court of Justice of the European Union ('CJEU') clarified that organisms obtained by gene editing techniques like CRISPR/Cas9 are subject to the regulations regarding genetically modified organisms set forth in Directive 2001/18 ('the GMO Directive'). The CJEU has strictly applied the precautionary principle laid down in Article 191(2) of the Treaty on the Functioning of the European Union ('TFEU'). For the future of gene editing in Europe this ruling shows the EU is unlikely to take a more liberal approach to gene editing, while there are hundreds of mutagenized crops already available in the global markets.

In its judgment the CJEU had to deal with the applicability of the GMO Directive[4] to new gene mutagenesis gene editing techniques such as CRISPR/Cas9. According to Article 4 of the GMO Directive, Member States shall, in accordance with the precautionary principle, ensure that all appropriate measures are taken to avoid adverse effects on human health and the environment which might arise from the deliberate release or the placing on the market of genetically modified organisms ('GMOs').

The CJEU had been asked for a preliminary ruling on these issues

- The first and second questions were whether varieties/organisms obtained by mutagenesis techniques/methods constitute genetically modified varieties/organisms, therefore GMOs within the meaning of the GMO Directive.
- The third question was whether Articles 2 and 3 of and Annex I B to the GMO Directive constitute a full harmonisation measure or whether the Member States – when transposing those provisions – have a discretion to define the regime to be applied to organisms obtained by mutagenesis.

Dealing with the first and second preliminary question

First of all, the CJEU had to interpret the scope of Article 2(2) of the GMO Directive, which defines GMOs as

"an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination".

While Annex I A to the GMO Directive in its part 1 lists techniques/methods referred to in Article 2(2)(a) which are deemed to result in GMOs, part 2 lists techniques referred to in Article 2(2)(b) of the GMO Directive which are not considered to be or result in genetic modification.

4 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0018

This is on the condition; however, that they do not involve the use of recombinant nucleic acid ('RNA') molecules or genetically modified organisms made by techniques/methods other than those excluded by Annex I B to the GMO Directive, which refers to Article 3 of the GMO Directive and excludes mutagenesis.

While "transgenesis" (Gene Delivery) is a genetic modification technique/method to introduce foreign genetic material, such as RNA, into host cells (of a living organism) and always results in a GMO, mutagenesis does not include a transfer or delivery of foreign genetic material. It still consequently leads to changes, mutations and modifications of the genetic material of the organism.

Therefore, if a mutagenesis technique/method does not fulfil the condition of not involving the use of RNA molecules or genetically modified organisms that themselves have been made by techniques other than those excluded by Annex I B to the GMO Directive, it can consequently result in genetic modification/GMOs.

That is ultimately why there is a differentiation between part 2 of the Annex I A and Annex I B. Mutagenesis would have been listed in part 2 of the Annex I A if it per se didn't result in GMOs.

Lumping it all together

It is striking that the CJEU inevitably assumed that the respective CRISPR/Cas9 techniques consequently lead to a GMO. With this assumption already made, it only dealt with the further question, whether the exemption laid down in Article 3(1) in conjunction with Annex I B(1) applies. After all, the Advocate General had differentiated substantively between Article 2(2) and Article 3(1) of the GMO Directive. As a matter of fact, paragraph 29 of the ruling shows that apparently some of the respective techniques involved the use of chemical or physical mutageneous agents while others involved the use of genetic engineering.

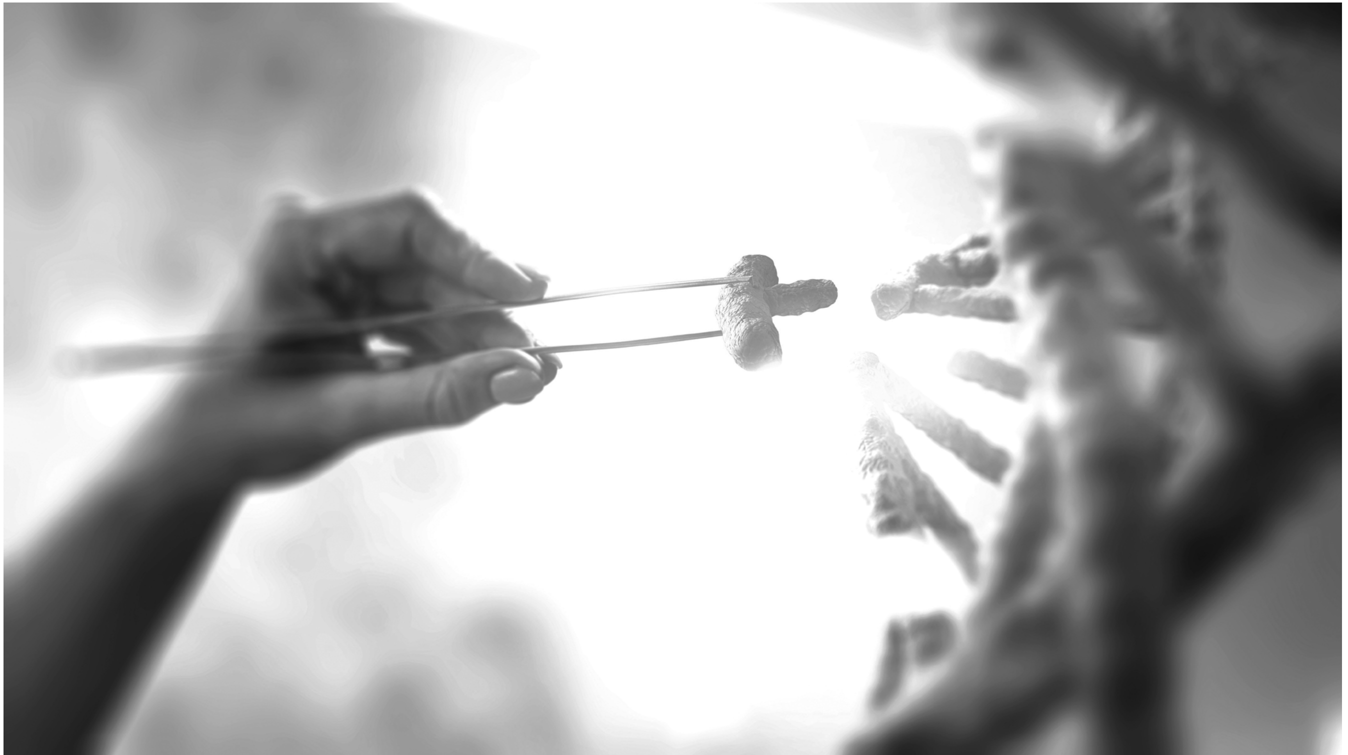
Had the CJEU applied Article 2(2) thoroughly, it would have had to deal with the question as to whether an organism that has been subject to mutagenesis has been altered in its genetic material in a way that would not have had occurred naturally by mating and/or natural recombination. Only if the organism had altered in such a way, the GMO Directive would have applied and therefore Article 2(2) in conjunction with Annex I A would apply, thus also leading to the exception of Article 3(1) in conjunction with Annex I B to the GMO Directive.

Static interpretation of the mutagenesis exception

The CJEU denied the mutagenesis exception for CRISPR/Cas9 techniques reasoning that only such mutagenesis techniques/methods could apply that had been known by March 12th 2001 as only those techniques and methods were approved. This consequently leads to the result that any mutagenesis techniques newer than March 2001 – meaning all the technical and scientific development of almost two decades – are deemed to lead to GMOs, resulting in the GMO Directive applying. This almost static and frozen interpretation of the CJEU is shaped by the precautionary principle laid down in Article 191(2) of the TFEU. This leads to a high level of protection and the "polluter pays" principle that stands in conflict with the need for agricultural innovations to prove themselves in the EU single market. These principles, together with the preventive principle and the principle of prioritising action to remedy damage to the environment at source, take into account the diversity of situations in the various regions of the EU. These are inherent to the EU but fail to meet the needs of innovation on the one hand and the need to accelerate in an ever-growing competitive global market on the other.

Dealing with the third preliminary question

The CJEU as well as the Advocate General have pointed out that Article 3(1) of the GMO Directive, read in conjunction with point 1 of Annex 1 B to that directive, in so far as it excludes from the scope of that directive organisms obtained by means of techniques of mutagenesis which have conventionally been used in a number of applications have a long safety record, cannot be interpreted as a full harmonisation measure, preventing Member States from legislating in that area. Consequently, and to the extent to which the EU legislature has not regulated those organisms, Member States have the option of defining their legal regime by subjecting them, in compliance with EU law, in particular the rules on the free movement of goods set out in Articles 34 to 36 TFEU, to the obligations laid down by the GMO Directive or to other obligations.



Consequences and conclusion for the future

The CJEU ruling makes clear all processes arising or developing after the adoption of the GMO Directive in March 2001 are not subject to the mutagenesis exception laid down in Article 3(1) in conjunction with Annex I B to the GMO Directive. The consequence of this is that the GMO Directive is in principle applicable to all CRISPR/Cas9 techniques developed ever since. All organisms derived from these techniques/methods are deemed as GMOs without the material prerequisites of Article 2(2) of the GMO Directive being decisive or required. Even though the Advocate General took a different view – for good reason –, this does not change the fact that this principle, now laid down by the CJEU, cannot be disregarded in the future.

However, the agricultural industry does still have options left with regards to gene editing techniques like CRISPR/Cas9 that – even in the light of this ruling – are still conceivable.

A case could be referred to the CJEU for a ruling in which a CRISPR/Cas9 technique is also used, but the organisms obtained in this way are not to be classified as GMOs within the meaning of Article 2(2) of the GMO Directive. This could be achieved by taking as a basis for the ruling an organism obtained by mutagenesis which could undoubtedly have been (or even has in fact been) produced naturally by cross-breeding and/or natural recombination.

If it is possible to obtain an organism by crossing and/or natural recombination, which can then be 'reproduced' identically by the CRISPR/Cas9 method, the GMO Directive would not be applicable, since the condition – the existence of a GMO as defined in Article 2(2) of the GMO Directive – would not be fulfilled. Thus, the CJEU would not be able to subject the organism obtained by mutagenesis to the provisions of the GMO Directive, particularly since the same organism would be present twice: once obtained by crossing and/or natural recombination and once obtained by mutagenesis (through CRISPR/Cas9) – and thus also a distinctness of one organism from the other would not be given.

Cartel investigation in the corn flour market in Mexico

Hernán González Estrada and Dante Trevedan, Mexico City

Mexico's Federal Economic Competition Commission (COFECE) announced recently that it has been conducting an ongoing investigation into whether companies or individuals established cartel arrangements (*prácticas monópolicas absolutas*) that have adversely affected the corn flour market.

The investigation, initiated ex officio by COFECE in October 2018 but publicly disclosed just this week, focuses on the manufacturing, distribution and marketing of corn flour, a key component of Mexico's food industry that represents sales in excess of 24 billion pesos per year.

COFECE did not name the economic agents under investigation and noted that the investigation does not prejudge their actions or inactions.

After launching its investigation October 9, 2018, COFECE had an initial term of up to 120 business days to conduct its probe. The initial term has already has been extended, however another 120 days and could be extended by two more 120-day terms.

At the conclusion of the probe, COFECE will issue a resolution either formally initiating a process against the involved economic agents or dismissing the case.

If COFECE holds that cartel arrangements in fact occurred, involved economic agents may face fines of up to 10 per cent of their revenue and will be ordered to cease the prohibited arrangement. These fines would be irrespective of, and in addition to, any criminal or civil liability that the economic agents may face. Individuals found guilty of participating in cartel arrangements may also face substantial fines in addition to civil and criminal liability up to ten years of imprisonment.

Provincial wine labelling laws trump the right to use a trademark

Chris Wilson, Vancouver

A recent Ontario Superior Court decision in Canada highlights the interplay between registered trademark rights and provincial wine labelling laws.

In *Royal DeMaria Wines Co. Ltd. v Lieutenant Governor in Council*, the applicant was an Ontario-based producer of icewine and a member of the Vintners Quality Alliance Ontario (VQA Ontario). VQA Ontario terminated Royal DeMaria's membership and revoked its prior approval of two previously approved icewines, preventing the winery from selling out its inventory of the wines that referred to "icewine" on the labels. Royal DeMaria had a registered trademark that included the text "Canada's Icewine Specialists," which it could no longer use after VQA Ontario's decision.

VQA Ontario establishes protected terms, sets quality standards and conditions respecting the use of those terms, and governs applications for approval for using these terms.

For an Ontario producer to label its wine as a VQA Ontario wine, it must meet certain requirements. In addition to geographical requirements for the grapes used, VQA Ontario requires a taste test for wines pursuant to its authority under s. 5 of the Vintners Quality Alliance Act, (the Act) such that not only must a wine be without defects or flaws, but also that "the wine is representative of quality wines of the stated category." In other words, unlike in British Columbia, the tasting panel can deny a producer the right to advertise its wine as a VQA Ontario wine if the panel concludes it is not representative, which includes style and typicity.

VQA Ontario also implemented rules regarding labelling varietals, vintage years, geographic indications, and other protected terms, including "icewine."

VQA Ontario terminated Royal DeMaria's membership after it failed to obtain VQA Ontario approval for any of its wines submitted over an 18-month period. Once its membership was terminated, Royal DeMaria was given a year to sell its remaining icewine inventory labelled as such.

Winery challenges VQA's powers

The winery, however, continued to sell this inventory after the grace period had expired, was prosecuted and subsequently acquitted on the basis that VQA Ontario had no authority to revoke the approval of pre-approved wines because of a lapsed membership. Subsequently, VQA Ontario passed a new regulation allowing it to do just that, and revoked the approval of the applicant's two previously approved icewines. As a result of this, Royal DeMaria Wines brought an application seeking declarations that:

- The taste-test rule was outside the authority granted to VQA Ontario.
- The 18-month membership lapse rule was outside the authority granted to VQA Ontario.
- The rule allowing VQA Ontario to revoke the approval of previously approved wines was outside the authority granted to VQA Ontario.
- The rules restricting the use of terms such as "icewine" conflict with federal legislation, namely, the Trade-marks Act, and therefore, are inoperable.

The Ontario Superior Court of Justice dismissed the applicant's claim in its entirety and upheld all the impugned VQA Ontario rules. Specifically, with reference to the rule restricting using certain terms on labels, the court held that both the Act and the Trade-marks Act have consumer protection purposes that are consistent and compatible with each other. The Act furthers the consumer protection purpose of the Trade-marks Act by ensuring that when wine manufacturers use certain terms that are also subject to provincial regulation, they are meeting quality standards. This complements, rather than frustrates, the purpose of the federal legislation.

The court concluded that accomplishing the Trade-marks Act's purposes does not require that the trademark owner have the right to use the trademark in any context without any constraint. The court noted a British Columbia decision that reached the same result when provincial tobacco advertising restrictions prevented Benson & Hedges from using certain registered trademarks. Ultimately the court concluded the Trade-marks Act does not grant any positive right to use a trademark at all, let alone in contravention of provincial legislation.

The author would like to thank Robert Hanson, articling student, for his help in preparing this.

NORTON ROSE FULBRIGHT

Canadian Trademark Law Chatbot

Ensuring compliance with the Proposed Trademark Regulations under the new *Trademarks Act* is a step-by-step process.

The new Canadian trademark law will come into force on June 17, 2019. The upcoming amendments will introduce substantial changes to the Canadian trademark landscape.

Are you Ready? Come discover our Canadian Trademarks Law Chatbot
nortonrosefulbright.com/parker

NRF Parker | Canadian Trademark Chatbot

Consultations open on the UN "zero draft" treaty on business and human rights

Kellie L. Johnston, Jasmine Landau, Benedict Wray, Canada

There is currently a short window of opportunity to provide input on the UN's zero draft of a Legally Binding Instrument to Regulate, in International Human rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the Zero Draft). This treaty could have far-reaching implications for businesses involved in transnational activities.

The UN Human Rights Council's Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (the Working Group) released a report on February 6, 2019, summarizing the fourth session of negotiations on the Zero Draft. The Zero Draft is an attempt to build off the 2011 UN Guiding Principles on Business and Human Rights (UNGPs) by creating a legally binding set of business and human rights obligations for states and corporations with transnational activities.

About the Zero Draft negotiations

The current drafting process has been guided by the UN Office of the High Commissioner for Human Rights, state representatives, civil society groups and industry stakeholders. While Canada has not participated in the process, several other OECD countries, including France, Germany and the UK, have attended and contributed to the discussions.

The first and second sessions of the Working Group in 2014 and 2016 were dedicated to deliberations on the content, scope, nature and form of a future treaty. At the third session in 2017, the Working Group discussed the elements to be included in a draft legally binding instrument. Following these consultations, the Zero Draft and optional protocol were published on July 16, 2018.

The fourth session took place in October 2018 in Geneva, using the Zero Draft as a basis for starting the second phase of negotiation. Significant time was spent discussing the creation of an international victims' compensation fund, and the interplay of domestic, regional and international legal liability. Some stakeholders raised concerns about the scope of "transnational activities," arguing the treaty should be binding on all corporations and state-owned enterprises.

However, the Zero Draft recognizes that states hold the primary responsibility regarding human rights. On the other hand, many stakeholders agreed that prevention through human rights due diligence (HRDD) was a key part of the Zero Draft.

Participants agreed to continue negotiations and consultations toward a viable binding international treaty on business and human rights and to schedule a fifth working group session in late 2019.

The Zero Draft's provisions: building on the UNGPs

- Below is a summary of the articles as currently drafted and discussed at the fourth session:
- Transnational corporate activities: The scope of "business activities of a transnational character" under Article 4 includes any for-profit economic activity, including electronic, undertaken by natural or legal persons in two or more jurisdictions.
- Human rights: These are expanded to include environmental rights, in an effort to reflect the UN's 2030 sustainable development goals.
- Victims and access to justice:

Victims can choose the jurisdiction of an action as based on the location where an act or omission occurred, or the court of the state where the person(s) alleged to commit the violation are domiciled. Article 7 also applies the law of the forum to the substantive and procedural aspects of an action, including that state's conflict of law rules.

"Victim" is given a broad definition, encompassing both individuals or collectives alleged to have suffered harm from transnational business activity. Family or dependents also have standing to bring a claim, as do individuals intervening to prevent victimization.

Article 8 sets out extensive requirements for states to provide access to justice. It envisions a domestic complaints process and enforcement mechanism, and would require states to participate in an international fund for victims to provide legal and financial relief to victims.

- State duties: States' duty to prevent violations is greatly expanded in Article 9. States would also have to ensure future trade and investment agreements do not conflict with the treaty's implementation, and that existing agreements are interpreted in a way that does not restrict a state's ability to meet its treaty obligations. There is also a mutual assistance and enforcement provision.

- Human rights due diligence: States would be obliged to introduce legislation requiring mandatory HRDD for persons within their jurisdiction or control that carry on transnational business activities. Companies would be required to monitor, identify, assess, prevent and report on actual or potential human rights and environmental impacts, including a duty to meaningfully consult with at-risk groups such as indigenous peoples. An option is given to states to impose a lower burden on SMEs.

- Criminal and Civil liability: Article 10 imposes both corporate criminal and civil liability for human rights breaches and requires state parties to pass domestic laws that reflect international crimes without a limitations period. Civil liability in a value chain would be based on the corporation's control or relationship with a supplier and the foreseeability of the human rights impact.

Implications

Although it is far from being a final document, and still has many difficult legal issues to overcome, such as jurisdiction and renvoi, the Zero Draft process has potentially radical consequences for states and companies engaging in transnational activity. If completed, the treaty will be legally binding upon states who sign and ratify it, which is a significant departure from the UNGPs. It also contains novel propositions that go beyond what many domestic laws already provide, and imposes an obligation on states to pass far-reaching supply-chain due diligence legislation akin to France's "Duty of Vigilance" law, and goes beyond the modern slavery legislation already in force in California, the UK and Australia.

The Zero Draft follows a growing global trend toward enforcing human rights obligations against businesses operating transnationally. The fourth session report indicates that many stakeholders want a legally binding instrument to ensure that human rights enjoy primacy over trade and investment agreements, although few companies have been included in the consultations.

Canadian companies engaged in international activities may wish to consider responding to the current consultation, which is a rare opportunity to provide input into the UN business and human rights process. We would be pleased to assist any clients or trade associations who are interested in preparing submissions.

Norton Rose Fulbright contacts

Key contacts

Asia
Craig Loveless
craig.loveless@nortonrosefulbright.com

Australia
Keira Brennan
keira.brennan@nortonrosefulbright.com

Canada
Kathy Krug
kathy.krug@nortonrosefulbright.com

Europe
Saskia Blokland
saskia.blokland@nortonrosefulbright.com

Middle East
Joanne Emerson Taqi
joanne.emersontaqi@nortonrosefulbright.com

Latin America
Charlie Johnson
charles.johnson@nortonrosefulbright.com

South Africa
Alessia Maxwell
alessia.maxwell@nortonrosefulbright.com

United States
Joseph Williams
joseph.williams@nortonrosefulbright.com

Contributors

Chris Wilson
chris.wilson@nortonrosefulbright.com

Kellie L. Johnston
kellie.johnston@nortonrosefulbright.com

Jasmine Landau
jasmine.landau@nortonrosefulbright.com

Benedict Wray
benedict.wray@nortonrosefulbright.com

Jay Modrall
jay.modrall@nortonrosefulbright.com

Milana Chamberlain
milana.chamberlain@nortonrosefulbright.com

Ruth Cowley
ruth.cowley@nortonrosefulbright.com

Holly Stebbing
holly.stebbing@nortonrosefulbright.com

Stuart Neely
stuart.neely@nortonrosefulbright.com

Maria Kennedy
maria.kennedy@nortonrosefulbright.com

Ginevra Biadico
ginevra.biadico@nortonrosefulbright.com

Dr. Klaus von Gierke
klaus.vongierke@nortonrosefulbright.com

Ettje Trauernicht
ettje.trauernicht@nortonrosefulbright.com

Notash Taheri
notash.taheri@nortonrosefulbright.com

Hernán González Estrada
hernan.gonzalez@nortonrosefulbright.com

Dante Trevedan
dante.trevedan@nortonrosefulbright.com

Global resources

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We employ 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

People worldwide	Legal staff worldwide	Offices
7000+	4000+	50+

Key industry strengths

- Financial institutions
- Energy
- Infrastructure, mining and commodities
- Transport
- Technology and innovation
- Life sciences and healthcare

Our office locations

Europe

- Amsterdam
- Athens
- Brussels
- Frankfurt
- Hamburg
- Istanbul
- London
- Luxembourg
- Milan
- Monaco
- Moscow
- Munich
- Paris
- Piraeus
- Warsaw

United States

- Austin
- Dallas
- Denver
- Houston
- Los Angeles
- Minneapolis
- New York
- St Louis
- San Antonio
- San Francisco
- Washington DC

Canada

- Calgary
- Montréal
- Ottawa
- Québec
- Toronto
- Vancouver

Latin America

- Mexico City
- Rio de Janeiro
- São Paulo

Asia Pacific

- Bangkok
- Beijing
- Brisbane
- Canberra
- Hong Kong
- Jakarta[1]
- Melbourne
- Port Moresby (Papua New Guinea)
- Perth
- Shanghai
- Singapore
- Sydney
- Tokyo

Africa

- Bujumbura[3]
- Cape Town
- Casablanca
- Durban
- Harare[3]
- Johannesburg
- Kampala[3]
- Nairobi[3]

Middle East

- Bahrain
- Dubai
- Riyadh[2]

1 TNB & Partners in association with Norton Rose Fulbright Australia
2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
3 Alliances

nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.