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

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From the editor

Welcome to our second edition of Competition World in 2017. For this edition, we asked our teams around the world to tell us about the key antitrust issues that were affecting their regions. From class action reforms in the US to agency issues in Australia, we identify the issues and explain the implications for your business. For a more detailed guide to antitrust laws around the world, you can use our global antitrust risk map, which summarizes the rules in each country and allows you to run searches to compare and contrast risks across regions.

We begin in the United States where there are proposals to reform antitrust class actions with a view to imposing greater national uniformity of procedure. We comment on the suite of proposed reforms and what this means for class certification in terms of raising uncertainties for claimants and defendants. In particular, we focus on the critical certification issue of “predominance” – which looks at the relationship between common and individual issues – and summarize the latest case law.

We then turn to Canada, where the Canadian Competition Bureau has once again cleared a merger on “efficiency” grounds, which otherwise would have been prohibited for raising substantial competition concerns. This has prompted calls for reform of the Competition Act so as to tighten this provision (which is at odds with other well-developed merger control regimes), raising questions as to how and when the rules might be revised.

Moving to Europe, we comment on the General Court’s decision in Printeos, which arose from the Commission’s settlement decision in relation to the envelopes cartel and involved the first appeal by a settling party to reach a judgment. We examine the reasons why the appeal was upheld and what this means for parties wanting to participate in the settlement process.

We move from envelopes to the digital sector. Firstly, we examine whether brand owners can control internet sales and remain compliant with competition law. Secondly, we outline and assess the antitrust risks presented by Big Data. Thirdly, we review the decision by the UK Competition and Markets Authority in Trod, which as you will recall from our first edition of Competition World this year is a case about the use of pricing algorithms to fix prices. In this edition, we focus on the CMA’s decision to disqualify Trod’s director and set out what directors need to know about the rules on disqualification. Fourthly, we turn to Germany where the competition rules have recently been significantly revised and comment, among other things, on the new value-based threshold for mergers that has been introduced as a means to catch transactions in digital markets.

Finally, we turn to Australia where we examine the balance of risk for agents versus principals, commenting on the recent decision by the High Court of Australia in Flight Centre where the court found that an agent may be in competition with its principal where certain features arise, such as the agent having the freedom to set its own prices or prioritize its own interests over those of its principal.

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Antitrust class actions in the United States have a long and much scrutinized history and have set the standard for similar actions worldwide. Proponents of class action reform have targeted 2017 for a new class action law aimed at imposing national uniformity of procedure. In this article, we comment on the proposed legislation and what this means in terms of class certification. We also review the latest federal case law on “predominance,” which is frequently the key issue in antitrust class certification in the US.

Proposed new legislation

In March 2017, the US House of Representatives (the House) passed legislation that would revise federal class action practice. The House approved the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017” (H.R. 985) by a relatively narrow 220-201 margin. Similar legislation passed the House in 2016, but died in the Senate. However, as President Trump is viewed as a likely supporter of the new legislation, opponents are preparing for battle in the Senate. If passed, the new law would make changes to US class action procedures in all substantive areas. Some of the highlights are as follows:

- Class members must be ascertainable as a prerequisite for class certification.
- Class members must incur the “same type and scope of injury”.
- The relationships between class counsel and class representatives must be fully disclosed.
- Payment of class counsel’s fees must be delayed until after settlement distribution is complete.
- The calculation of class counsel fees would be tied to the actual pay-out to class members, and in injunctive classes, it would be tied to value of injunctive relief.
- Class certification would be limited to situations where entire case meets certification prerequisites, not just part of the claims.
- Disclosure of third-party funders supporting the class would be required.
- Immediate appeals from orders granting or denying class certification would be allowed, without asking for permission from appeals court.
- Discovery would be barred during the pendency of preliminary motions.

Some of these proposals have been required in certain jurisdictions under various court decisions, but a federal statute would make their application uniform in all federal courts. Leaders of the class action plaintiff bar have committed to oppose the bill.

Predominance issues in antitrust actions

The proposed legislation would be likely to increase opportunities for defendants to defeat class certification, but the predominance inquiry will undoubtedly remain a crucial consideration in determining whether an antitrust claim is suitable for class certification. This is because, in determining class certification in the US, the “predominance” issue in cases that require individualized proof on liability issues is the overriding question. In particular, no liability issue is under more scrutiny during class certification than antitrust impact or injury. The US Supreme Court in Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. explained that claimants “must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful” and that the alleged injury “should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” Some courts have allowed plaintiffs to

Antitrust class action update in the US: will the rules be changed?
satisfy the predominance requirement by demonstrating merely that they plan to prove antitrust impact at trial using common evidence. Similarly, in an antitrust conspiracy case, some courts have held that common proof of the alleged conspiracy is sufficient to satisfy the predominance requirement. Other courts, however, have imposed more stringent requirements on plaintiffs at the class certification phase. The Third Circuit, for example, requires that plaintiffs offer common proof of more than merely a common conspiracy; rather, plaintiffs must demonstrate that class-wide issues will predominate over individual issues with respect to

- Violation of the applicable antitrust law
- Fact of injury or impact
- The amount of damages

Furthermore, the Supreme Court’s decision in Comcast Corp. v Behrend, emphasizes that predominance is lacking, and certification is thus inappropriate, when predominance is put forward by the class is not tied directly to the liability theory that is certified. In that case, plaintiffs alleged four theories of antitrust impact but the district court only found one of those theories “capable of class-wide proof.” The plaintiffs’ expert proffered a damages model that calculated damages based on all four theories and did not isolate damages resulting from any one theory of antitrust impact. This failure made the case unsuitable for class certification. The Court ruled that “[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the certified liability] theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”

On the other hand, courts have indicated that individualized questions as to the calculation of class members’ damages alone will not suffice to defeat predominance at the class certification phase. For example, in In re Scrap Metal Antitrust Litigation, the Sixth Circuit affirmed the certification of a class in which the defendants had argued that damages could not be calculated on a class-wide basis. The court rebuffed defendants on appeal, finding that defendants “erroneously assume that the issue of damages must predominate.” Instead, the court concluded that proof of conspiracy as a common question predominated over other issues, and that “[e]ven where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure.” Where damages issues will require individual proof, some courts have embraced limited certification of a class for liability purposes and conducted separate individual trials where necessary on damages issues. If enacted, however, the proposed legislation described above may restrict where necessary on damages issues. Because the district court found that plaintiffs had an “intention” to try the case in a manner that satisfied the predominance requirement, it certified the class. On appeal, the Third Circuit vacated the decision. The appellate court emphasized that “[antitrust] impact often is critically important for the purpose of evaluating Rule 23(b)(3)’s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof.” Because the district court required only a “threshold” showing, the appellate court concluded that it had failed to conduct the “rigorous analysis” required under Rule 23(b)(3) and remanded the case for more complete consideration.

Similarly, the Third Circuit clarified the application of the predominance requirement under Rule 23(b)(3) to antitrust claims in American Seed Co. v Monsanto Co. The plaintiff in American Seed argued that it could establish a presumption of class-wide antitrust impact through the use of common proof. After examining the opinions of the plaintiff’s expert, the district court concluded that the expert had not demonstrated the validity of his theory of impact by comparing the theoretical results generated by the expert’s theory to actual data made available by defendants in discovery. The district court denied class certification, and the Third Circuit affirmed, holding that the putative class must support its proposed presumption of antitrust impact with “some additional amount of empirical evidence.”

In addition to Comcast, a prominent example from the Third Circuit of the treatment of the predominance inquiry is In re Hydrogen Peroxide Antitrust Litigation. In that case, the district court certified a Rule 23(b)(3) class of purchasers of hydrogen peroxide and related chemical products, noting that the plaintiffs only needed to make a “threshold” showing to satisfy the predominance requirement. Despite predictions that Comcast and Hydrogen Peroxide might lead to fewer antitrust class certifications, courts have subsequently approved classes. The First, Third, Seventh, and Tenth Circuits, for instance, have all resolved certification appeals in favor of the plaintiffs in recent years, finding predominance satisfied.
Conclusion

Even if the new federal statute is not enacted, Federal Rule of Civil Procedure 23 will remain the key to determining the type of antitrust claim that is appropriate for class certification, and the predominance analysis of each case will turn on unique facts.

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Showdown at the efficiencies corral: Canada’s Competition Bureau clears another anti-competitive merger

The Competition Bureau (the Bureau) recently cleared the proposed acquisition of Canexus Corporation by Chemtrade Logistics Income Fund despite concluding that the transaction was likely to result in a substantial lessening or prevention of competition. Despite these concerns, the Bureau found that the expected efficiencies resulting from the deal would likely significantly outweigh the anti-competitive effects. This is the second time a transaction involving the acquisition of Canexus has been cleared on this basis and confirms the Bureau is willing to undertake the efficiencies analysis itself rather than refer the matter to the Competition Tribunal (the Tribunal) for determination.

Background to the Canexus review

Section 96 of the Competition Act (the Act) provides that the Tribunal must not make an order prohibiting a proposed transaction where it finds that the proposed merger “is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.” The Supreme Court of Canada confirmed the applicability of section 96 in its 2015 Tervita decision, stating that “Section 96 does give primacy to economic efficiency.”

In October 2015, Superior Plus Corporation announced its plan to acquire Canexus. After an extensive review by both the Bureau and the United States Federal Trade Commission (the FTC), in June 2016 the Bureau announced it would not challenge the transaction on the basis that the efficiency gains were greater than the significant anti-competitive effects. The Bureau considered a detailed analysis submitted by a Superior-engaged expert, and also retained its own external economic expert to model the deadweight loss (a type of inefficiency) that would result from the proposed transaction.

The FTC announced it would challenge the transaction because of the anti-competitive effects on the North American market for sodium chlorate. Although US antitrust enforcers consider the impact of merger-related efficiencies, there is no analogous express efficiencies defense in US antitrust law. Ultimately, the proposed transaction was abandoned because the parties could not agree on an extension to the deal pending legal action in the US.

Duelling legislative agendas?

Commissioner of Competition, John Pecman, has stated he does not believe that the efficiencies defense as it has been applied reflects Parliament’s intent when section 96 was introduced, suggesting in a 2016 speech on Strengthening Competition that it is “misaligned with other jurisdictions” and “is bad for businesses and bad for consumers.” In calling for the “harmonization” of Canada’s approach to efficiencies, it is clear he would like to see it repealed or revised.

This would not be the first time the Bureau has supported the idea of amending section 96. After five years litigating a proposed merger that was ultimately allowed by the Tribunal and upheld by the Federal Court of Appeal on the basis of section 96, the Superior Propane case) former commissioner Konrad von Finckenstein spoke before a House of Commons standing committee in 2003 in support of a bill that would have required that any claimed efficiencies provide benefits to consumers. Von Finckenstein told the committee that the current analysis “is so difficult to apply, and it’s conceptually, in our view, wrong. It’s much better to have a test … where … you will only allow it where there is a net benefit to the consumer.”

Following the Superior decision, the Bureau’s unofficial practice for several years was that any anti-competitive merger would be challenged before the Tribunal, and it would not undertake the analysis of balancing the efficiencies against the anti-competitive effects of the merger. Von Finckenstein’s successor, Sheridan Scott, announced in 2006 that the Bureau would no longer seek amendments to section 96 and would, in appropriate cases, consider the
efficiencies defense. However, no cases were expressly cleared on that basis until 2016’s Canexus decision, and the 2017 Canexus do-over.

What next?
The key question moving forward is whether Commissioner Pecman will convince the government to amend the Act, and how the Minister of Innovation, Science and Economic Development’s quest for an innovative and dynamic economy jibes with removing or amending a provision that allows for efficiency-enhancing mergers.

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In December 2016, the EU General Court issued its first judgment on an appeal brought by Printeos, a settling party, against a settlement decision relating to the envelopes cartel (case AT.39780). Although there can be little doubt that settling parties are entitled to appeal settlement decisions (since the right to an effective remedy and to a fair trial is guaranteed by Article 6 of the European Convention of Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights (CFR)), questions were nonetheless raised about the admissibility of the appeal given the nature of the action.

The General Court not only confirmed that such an action is admissible but also that whilst the efficiency gains sought by the settlement procedure set inevitable and legitimate limitations to undertaking’s rights, these limits cannot be set at the cost of general principles of EU law. This judgment therefore helps to pave the way for future appeals.

Overview of the settlement procedure

The European Commission’s settlement procedure was introduced in 2008 and is used by the Commission to speed up the procedure for the adoption of cartel decisions when the parties admit to the Commission’s objections. In return, the settling party receives a ten per cent reduction in the fine.

To achieve the expected efficiencies under the EU settlement procedure, parties willing to settle a case have to accept several limitations to their rights of defense. Most obviously, settling parties do not submit a full defence in writing (such as the response to the statement of objections in standard procedure) and can only draw the Commission’s attention to flaws in key aspects of the case in so-called “Technical Non-Papers”.

Parties also have limited access to the Commission’s case file to key evidence selected by the Commission’s case team and there is no opportunity to present an oral defence during a hearing.

How does the procedure work in practice?

The settlement procedure involves three rounds of formal bilateral (and confidential) meetings held between the Commission and each undertaking under investigation which has indicated a willingness to settle. During the course of these meetings, the discussions focus on the scope of the infringement, the key evidence contained in the case file, the extent of the undertaking’s liability and the methodology to set fines, as well as the range of the fines to be imposed. Before discussing fines, all parties need to individually reach a common understanding with the Commission regarding the description of the infringement. This common understanding, set out in a document called the “case overview”, outlines, among other things, how the cartel worked and what was the role of each party.

Only when the wording of the case overview has been agreed can discussions move on to the level of the fine. At this point, parties are no longer provided with any indication of other parties’ positions. This means that while each party will be aware of the scope of each undertaking’s liability the Commission does not provide any information on the range of other party fines. In practice, this means that the first opportunity for a settling party to measure its fine against others is the final decision, at which point it is no longer open to them to discuss their fine with the Commission.

What scope is there for parties to challenge deficiencies in the decision?

If a settling party notices any irregularity in the setting of the fines, its only possible remedy is an action for annulment before the General Court. This was indeed the road followed by Société Générale (Case T-98/14) in its action for annulment against the Euro Interest Rate Derivatives of December 4, 2013 (which was subsequently withdrawn) and indeed by Printeos in its action of February
20, 2015. Both undertakings sought to obtain the annulment of the article of the settlement decision which set their fines based on alleged violations of the principles of proportionality and equal treatment and the Commission’s failure to state sufficient reasons, including when determining the penalty.

Neither applicant contested its involvement in the alleged infringement. However, they argued that the Commission had failed to specify to the requisite legal standard the reasons why it had adjusted the basic amounts of the undertakings’ fines by departing from the Commission’s Fining Guidelines. In particular, the applicants claimed that the decision did not clearly explain why the Commission had applied different rates of reduction to different undertakings. Asserting that to comply with the requirements for clarity and precision, insofar as they relate to the principle of equal treatment, the reasons should have indicated (i) all factors necessary to determine whether or not the undertakings were in a comparable situation, (ii) whether the situations were treated differently or the same way and (iii) whether any objective justification could explain any difference in treatment applied.

In the case of Printeos, the General Court upheld this plea noting that the obligation to state reasons is an essential procedural requirement (set out in Article 296 TFEU) that must be raised on its own motion by the court and does not become less onerous in a settlement procedure because of the information disclosed to the parties during settlement meetings. On the contrary, the judgment refers to the standard set in Chalkor, in which the Court of Justice emphasized the special importance attached to the Commission’s duty to state reasons when setting fines in competition cases and the need for the Commission to "explain the weighting and assessment of the various factors taken into account in determining the amount of the fines”. Furthermore, the General Court ruled that this principle is of "even more fundamental importance" when – as was the case in Envelopes – the Commission departs from the methodology provided by its Fining Guidelines to reflect the specific circumstances of a case. What had happened was that, pursuant to paragraph 37 of the Fining Guidelines, the Commission had opted for an exceptional adjustment to the basic amount of the fine of the undertakings concerned to take into account the fact that most of them were acting in a single market (as most fines would otherwise have reached and exceeded the ten per cent ceiling set in Regulation 1/2003).

Following a thorough step by step review of the Commission’s calculation of the fines, the General Court concluded that the Envelopes decision was vitiated by a failure to state reasons, adding

- First, if reasons were insufficiently stated in the statement of objections and in the decisions, the Commission cannot remedy this failure belatedly (i.e. during proceedings before the General Court) or claim that the undertaking received sufficient information (by another means) during the administrative procedure.

- Second, despite the fact that proceedings before the General Court are exclusively inter partes (i.e. only have effects on the applicants and the Commission), the General Court’s review of the Commission’s duty to state reasons when setting fines is not limited to the reasons stated with respect to the fine adopted against Printeos.

**The future of the settlement procedure**

Two actions for annulment have now been submitted against settlement decisions based on what appears to be a “gap” in the procedure: since the parties are not informed of the maximum fines to be adopted against other settling parties during the discussions, this information cannot form part of what they agree to in their settlement submissions. Given the General Court’s judgment in Printeos, any violation by the Commission of the principle of equal treatment in setting fines, or insufficient reasons concerning how other parties’ fines were set, appears to open up a potential ground for appeal which cannot be pre-empted during the settlement procedure.

Of course the Printeos judgement does not answer all of the questions raised by the current settlement procedure. It remains to be determined whether the Commission would have argued that the action was inadmissible if, for example, it had been founded on any element agreed by Printeos during the settlement procedure. Alternatively, if a settling party was seeking an annulment by contradicting its own settlement submission, it also remains unclear whether or not the Commission would request the withdrawal of the ten per cent reduction of fines automatically granted in settlements. This outcome would be in line with Tokai Carbon (see Case T-236/01) in which it was confirmed that a ten per cent reduction of fines obtained for not substantially contesting the facts under the 1996 Leniency Notice could be subsequently reduced or withdrawn if the undertaking started to challenge the facts on appeal. Therefore, a necessary development of the Commission’s settlement practice may be to include, in the discussion rounds, an exchange on other parties’ maximum fines to limit the risk of
appeal and preserve the efficiency of the procedure.

Following this first judgment regarding a settlement decision, it will be interesting to see if this was an isolated case, or if the “gap” left in the settling parties’ information (i.e. the level of the fines of other settling parties) may open the door to multiple appeals, thus defeating the efficiency purpose of the procedure. More generally, the increasing number of settlements generates a concern that the Commission’s decisional practice may become of lesser quality, due to shorter and less heavily deliberated decisions being adopted as a result of this procedure.

This might progressively lead to a wider margin of discretion being granted to the Commission to adopt infringement decisions without adequately justifying them (for example, by qualifying certain types of conduct as anti-competitive by object even in unprecedented cases) and create legal uncertainty for undertakings under investigation. However, Printeos also confirmed that an effective judicial remedy remains available to settling parties and that the standard of review should not be lowered as a result of the settlement. This ensures that, in the short term, the fundamental rights of defence of the parties are rigorously observed and, in the longer term, creates incentives for the Commission to maintain the quality of its decisional practice to avoid annulments by the General Court.

One thing is certain: the Commission cannot sacrifice fundamental procedural guarantees in the guise of achieving greater efficiency of process. Now that this principle has been (re)established, it will be interesting to see how it will be translated to other problematic aspects of the procedure. In particular, the long-awaited judgment in response to ICAP’s action for annulment against the Yen Interest Rate Derivatives decision (Case T-180/15) could provide further indications as to how the Court intends to balance the parties’ rights of defence with the search for efficiency in the hybrid staggered procedure. Under the current decisional practice of Commission, when one or more parties decide to withdraw from settlement discussions, the Commission will first adopt a decision against the settling parties and then only later resume its investigation against non-settling parties. ICAP argued that this process irremediably breached its presumption of innocence since the settlement decision took position on elements which directly affected its own liability. The General Court is expected to confirm in the course of this year whether or not the hybrid staggered procedure violated ICAP’s presumption of innocence.

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Can brand owners control internet sales and remain compliant with competition law?

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Restrictions on internet distribution and competition law compliance generally do not mix. However, in a recent speech, Johannes Laitenberger, a high-ranking official within the Competition Directorate of the European Commission, stated that “while blanket internet sales bans are undoubtedly a restriction ... this does not apply to all restraints on online sales”.

He was referring to a case, Coty, which is currently before the European Court of Justice (ECJ) for a preliminary ruling on whether online sales restrictions linked to selective distribution systems are legitimate or not from a competition law perspective.

We explain why this case will bring some much-needed clarity to an area where different competition authorities have taken different views and what this might mean for brand owners seeking to exercise control over how and where their products are sold online.

The general approach to online resale restrictions

In general, competition law takes a dim view of attempts by brand owners to restrict online sales. In its guidelines on vertical restraints published in 2010, the European Commission (the Commission) noted that the internet is “a powerful tool to reach a greater number and variety of customers than by more traditional sales methods”, that “every distributor must be allowed to use the internet to sell products” and that using a website is a form of “passive selling”, which generally cannot be restricted without such a restriction being considered “hard-core”.

More recently, in its provisional findings from the e-commerce sector inquiry (launched as part of its Digital Single Market strategy), the Commission expressed concerns that the increased price transparency and competition facilitated by the internet had led suppliers to seek to take back control, including by resorting to the imposition of an increasing number of contractual restrictions on online sales in an attempt to better control distribution. The Commission considered that certain of those practices would require further investigation.

In its guidelines on vertical restraints, the Commission has long suggested that certain restrictions which are legitimate when imposed on bricks-and-mortar distributors can apply to sales over the internet. So, for example, just as it is legitimate to restrict active selling (marketing) by a bricks-and-mortar distributor into a territory or customer group exclusively allocated to another, so online advertising by an internet site targeted outside an allocated territory can be restricted. The guidelines suggest that the same may be true of restrictions used in selective distribution systems, provided those systems are genuine and justified by the nature of the product.

Commission guidelines on selective distribution

Selective distribution systems restrict the number of authorised distributors not on the basis of territories but on the basis of qualitative, objective criteria linked to the nature of the product that distributors must satisfy in order to be selected. These systems are often used for the distribution of luxury or branded goods where there is a brand image to protect or where there is a need to preserve quality or to explain its use.

The Commission’s vertical restraints guidelines state that suppliers may require quality standards for the use
of an internet site to resell its goods (in the same way as it might for sales via shops). In relation to third party platforms, such as online marketplaces, the guidelines note that suppliers may require that their distributors only use such platforms in accordance with the standards and conditions governing the distributor's internet use.

This suggestion that it is permissible for suppliers' selective distribution systems criteria to ban distributors from using certain third party internet platforms, as long as the criteria restricting such use achieve the same objectives as any bricks-and-mortar criteria, and only go as far as is necessary and proportionate to achieve the aim, seems logical. To the extent suppliers implementing selective distribution systems are permitted to prohibit sales through third party bricks-and-mortar retailers, they should be able to achieve the same objective online.

However, although the guidelines are clear, application of this principle in cases to date has been far from consistent.

**Diverging case law**

Online resale bans were first considered by the ECJ in *Pierre Fabre*. A branded cosmetic goods supplier had imposed resale terms on its distributors, requiring its products to be sold only in a physical store where a pharmacist was present, so prohibiting any sales of its products over the internet. The ECJ ruled that such a ban was a hard-core restriction of competition. Although *Pierre Fabre* only concerned internet-wide sales bans, an excerpt from the judgment has since been used by German national courts to develop a wider principle that, “the aim of maintaining a prestigious image is not a legitimate aim for restricting competition”, directly contradicting the view expressed by the Commission in its guidelines.

A later judgment in a higher German national court sought to reconcile the two views by suggesting that protecting a luxury brand image was insufficient to justify a blanket internet sales ban (as in *Pierre Fabre*), but could be sufficient to justify third party internet platform restrictions, through the application of criteria for a selective distribution system.

Michael Grenfell, Executive Director of enforcement at the UK Competition and Markets Authority, suggested a similar approach in his November 2016 speech where he discussed the difference between an outright online sales ban and an online platform ban – whereas the former is strictly prohibited, the latter should not be considered an automatic or “hard-core” restriction but rather requires case-by-case analysis to the effects of (and justifications for) such a ban.

This seems a sensible reconciliation. Certainly, the broad interpretation of *Pierre Fabre* by the lower German national court contradicts another ECJ ruling in *Promptia*, which found that, in the context of a franchise distribution system, aiming to maintain a luxury brand image and preserving a uniform distribution system could be legitimate aims and should not be automatically dismissed as justifications. It would seem odd if what were true for franchise distribution models did not hold for selective distribution systems.

**Clarification expected in Coty**

The upcoming Coty case represents a good opportunity for the ECJ to clarify the position. This case relates to restrictions on selected distributors’ use of third party internet platforms (rather than a blanket ban on internet sales as seen in *Pierre Fabre*). Coty, a supplier of luxury cosmetic products, prohibited selected distributors from using online marketplaces (such as Amazon or eBay), but allowed its selected distributors to use their own websites. Germany has asked the ECJ to opine on whether a qualitative selective distribution system can justify restrictions of online sales where the aim is to maintain a luxury brand image.

The case has caused a split between national competition authorities. In a formal intervention in the case, the European Commission has stated that, in its view and in the context of a selective distribution system "mere marketplace bans are not hardcore restrictions", but should not go beyond what is necessary to protect the system. The Commission’s view is supported by Austria, Italy, France and the Netherlands. However, Germany and Luxembourg have argued that online platform bans should be considered hard-core restrictions in the same way as blanket restrictions on online sales (as in *Pierre Fabre*).

**What implications does this have for brand owners as regards online reselling?**

It is clear that, in general, brand owners should be very cautious when attempting to restrict online reselling activity. Internet-wide bans on resales will always infringe competition law and could lead to significant fines being imposed by competition authorities. However, it does appear that there is substantial support at the Commission and amongst certain national authorities for the view that what is acceptable to restrict in bricks-and-mortar sales should, in principle, be acceptable to restrict online.
In the context of a selective distribution system, this view would mean that it is acceptable to restrict online sales to websites and platforms that conform to certain objective, qualitative criteria and prohibit sales through platforms that might damage the brand’s image, provided such restrictions are justifiable given the nature of the product and are proportionate and necessary to achieve the aim. This view seems the most logical. We will know shortly whether the ECJ agrees.
The explosive growth in companies’ exploitation of big data is drawing intense scrutiny from European antitrust authorities. EU Competition Commissioner Margrethe Vestager has promised to “keep a close eye on how companies use data” and a number of European antitrust authorities have conducted full-blown studies on big data issues, including an especially comprehensive May 2016 Franco/German study on “Competition Law and data”.

Antitrust authorities fear that big data can create barriers to entry and market power, especially where companies hold unique datasets that cannot be replicated by competitors. However, a closer look at big data-related theories of harm suggests that the focus on uniqueness may be misplaced. Many companies collect voluminous datasets that are unique and non-replicable, as well as, being valuable and competitively significant, without raising exclusionary concerns of the types highlighted by antitrust authorities.

The perception that limited access to big data may create barriers to entry and stifle the growth of the digital economy risks provoking an overbroad legislative reaction. In January 2017, the EU Commission consulted on a wide range of data-related issues, proposing among other things that companies be required to share non-personal, machine-generated data with third parties, including competitors, whether or not the data-holder holds a dominant position or engages in abusive conduct. As such, it would go far beyond any access remedy recognized in the antitrust context.

This article discusses European antitrust authorities’ concerns about the foreclosure risks of big data from the perspective of the different types and uses of big data. This approach reveals that exclusionary concerns arise in a relatively small segment of big data uses, and those situations can be assessed using traditional antitrust tools. Some important big data issues not addressed in this article include the mirror image of these exclusionary concerns – i.e., that ubiquitous big data can make markets so transparent that competition may be impaired by competitors using pricing algorithms – the role of big data in merger review, and the relationship between antitrust enforcement and data protection. Big data are a big topic, and a complex one.

What is “big data” and which characteristics are antitrust-relevant?

Big data are commonly defined by reference to the “three Vs,” “volume,” “velocity” and “variety.” A fourth “V” – veracity – is sometimes added. But potentially more important characteristics for antitrust purposes include who is collecting the data and on what subjects; whether comparable data are available from multiple sources; the marginal value of additional data; and the reduction in data’s value over time.

Data are often collected directly on companies’ own assets, products and services, or on their customers, and used by those companies for a variety of business purposes. But data can also be purchased as a product, in which case it can be described as “third-party data,” in contrast to the “first-party data” collected or inferred directly. The novel issues raised by big data relate mainly to first-party data, while third-party data issues can be evaluated under traditional antitrust principles.

Data are often said by proponents to be “non-rivalrous,” in that multiple entities can collect and use the same datum, and “ubiquitous.” Data are indeed non-rivalrous from a property law perspective, and data are certainly ubiquitous in a general sense. For antitrust purposes, however, such observations may be overly broad. For example, companies developing and testing products ranging from jet engines to automobiles to computers collect huge volumes of data on their products, and those data are not generally accessible to competitors. The unique and non-replicable nature of such data does not raise antitrust concerns, however, and antitrust
authorities would not normally view sharing of such data among competitors as pro-competitive.

Proponents also note that decreasing marginal returns to scale limit the competitive advantages from large amounts of data, and data’s value may decrease quite quickly over time. Again, these observations may be simplistic, since the incremental value and useful life of data depends on the type of data and the uses to which it is put. In more time-sensitive applications, such as targeting promotions to consumers passing near a coffee shop, incremental data about potential customers’ interests and activities may not exhibit diminishing marginal value, but that value may be short-lived. Conversely, where data’s value is less time-sensitive, for instance data generated by testing and developing products over months or years, beyond a certain volume incremental data seem more likely to yield diminishing marginal returns, suggesting that a big company cannot necessarily foreclose competition from smaller companies simply because it has more data.

Big Data, barriers to entry and market power

Antitrust authorities fear that the need for a large volume or variety of data may result in entry barriers when new entrants or smaller companies are unable to collect or buy access to the same kind of data as established companies. They fear that such characteristics could be self-reinforcing, converging towards a monopolization of data-related markets. Authorities acknowledge that big data can also reduce entry barriers, however, for instance if new entrants can use data to identify consumer needs more efficiently than with traditional methods.

The Franco/German Study indicates that where “access to a large volume or variety of data is important in ensuring competitiveness on the market (which is a market-specific question), the collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies.” The Study seems to assume that where big data practices give rise to entry barriers, they are a source of market power.

But general statements about big data’s propensity to raise barriers to entry can be misleading. Although the Franco/German Study acknowledges that the importance of data varies from market to market, whether big data raise or lower barriers to entry also depends on the nature and use of the data and the availability of alternative data sources. In the case of third-party data available as a product, for example, the same data normally would be available to anyone willing to pay for it, absent exclusive contracts (as discussed below). In that case, the extent of any barrier will depend on the data’s cost, as with any input. The extent to which such costs represents a barrier to entry will vary depending on the business in question and companies’ alternatives, but these issues are not unique to big data.

In the case of first-party data collected directly, no two companies will have access to exactly the same data, so each company’s dataset is unique. The question is whether the uniqueness of a particular company’s data creates a barrier to entry for others, because they need data to compete and lack alternative sources to data that are substitutable for their purposes. This issue would not arise in relation to first-party data companies collect on their own assets, products and services, since the fact that one company has collected such data would not preclude competitors from doing the same.

The situation is more difficult with regard to first-party data companies collect on other legal and natural persons, because there are many different sources and different data are needed for different purposes. Evaluating the substitutability of different datasets can be difficult even for companies in relatively similar businesses. For example, a specialized online retailer seeking data to advertise a particular product line would have more limited data needs than a generalist online retailer. The characteristics of the required data may also vary significantly; for instance, the value of information on consumer interests in large or unusual purchases such as automobiles or leisure travel may be much more time sensitive than information on repeat purchases such as books, music or food. The cost associated with collecting these data will vary significantly, as will the alternative sources available, which could include a combination of first-party and third-party data. The volume and variety of data a company needs for a particular purpose may also vary depending on the processing tools available to it, such as internally developed algorithms or third-party software. Where big data are collected and used for product development and testing, on the other hand, each company needs data on its own products, so a dataset developed by one company does not create a barrier to entry for another, no matter how unique and non-replicable it is. The cost of data collection and processing tools may constitute a barrier to entry, but the issue again is not unique to big data.

These examples illustrate the risks of generalizing about the extent to which big data practices raise or lower barriers to entry. It seems clear, in any case, that the mere fact that a particular dataset – even a highly valuable one – is unique and non-replicable does not
imply that competitors necessarily need access to the same or even similar data to compete.

The inference that data-related barriers to entry translate into market power is similarly open to question. Except where the data themselves are offered as a product, the nature of a dataholder’s market power depends on the competitive structure of the markets in which it is active. Even if the need for big data does create a barrier to entry, it does not necessarily follow that a company holding such data has market power, or a dominant position, in a related market.

**Big Data and exclusionary practices**

The Franco/German Study identifies five types of conduct in relation to big data that it fears could be exclusionary: refusal to provide access to data; discriminatory access; exclusive contracts; tied sales and cross-usage; and discriminatory pricing. Each of these exclusionary theories of harm is discussed briefly below.

**Refusal to provide access to data**

The first exclusionary conduct discussed by the Franco/German Study is a refusal to provide access to data, which can be anticompetitive “if the data are an ‘essential facility’ to the activity of the undertaking asking for access.” Since third-party data are offered to third parties for consideration, this theory of harm could apply where a dominant provider in a particular data market refuses to supply such data to competitors. This is a traditional antitrust scenario, however; the more novel data access issues concern first-party data collected by a company and not otherwise made accessible to competitors or other third parties.

Under the European Court of Justice’s judgments in *Microsoft*, *IMS* and *Bronner*, an authority can order a company to give a competitor access to an “essential facility” if the incumbent’s refusal to grant access (i) concerns a product which is indispensable for carrying on the business of the company seeking access, (ii) prevents the emergence of a new product for which there is a potential consumer demand (this condition being applicable when the exercise of an intellectual property right is at stake), (iii) is not justified by objective considerations and (iv) is likely to exclude all competition in the secondary market. A product or service is “indispensable” for these purposes only if there are no alternative products or services and there are technical, legal or economic obstacles that make it impossible or unreasonably difficult for any undertaking seeking to operate on the downstream market to develop products or services, even in cooperation with other companies.

These requirements would be met, according to the Franco/German Study, “if it is demonstrated that the data owned by the incumbent is truly unique and that there is no possibility for the competitor to obtain the data that it needs to perform its services.” This statement seems overly broad as applied to first-party big data, for three reasons.

First, for a duty to provide access to arise under EU law, the company holding the data would need to hold a dominant position in a market for a product or service other than the data themselves. As discussed above, first-party data collected by a dominant company may or may not constitute a barrier to entry to competitors or contribute to a dominant position on the part of the dataholder. The existence of the dominant position, and the relation between the dominant company’s data and its dominant position, do not follow from the unique and non-replicable nature of the data.

Second, the potential competitor seeking access to a dominant company’s first-party data would have to require access to the data to develop a new product or service in another market for which there is potential consumer demand. In other words, there is no EU law basis to suggest that a company could be required to share its data to allow a competitor better to compete with it in the same market, even if the data in question are unique and not otherwise available to competitors.

Third, even if the company seeking access to data wanted to use that data to offer a new product or service, it would have to show that developing the new product or service without access to the dominant company’s data would be impossible or unreasonably difficult, and that refusal to provide access would exclude all competition for the new product or service. Whether the need for data meets the required standard would depend on the data and the purpose for which the non-dominant company needs it. If a company seeking access wants to use the data to develop a new type of individually targeted advertising service, for example, the short-lived value of the data in question may make it difficult to show the requisite level of need, while the availability of many different types of data may make it difficult to show that it would be impossible or unreasonably difficult for the company seeking access to use alternative data or that the lack of access would exclude all competition for the new product or service.

**Discriminatory access**

The Franco/German Study argues that refusal to [provide] access [to] data could also be deemed anticompetitive if
it is discriminatory.” According to the Study, discriminatory access to strategic information by vertically integrated companies can distort competition, for instance where marketplace operators also operating as online retailers may get access to information about their competitors selling on that marketplace and the behavior of consumers. Thanks to such information, a vertically integrated platform might be able to adjust its product range and pricing more efficiently than a non-vertically integrated retailer. A vertically integrated platform could also restrict the information received by downstream competitors regarding transactions they are involved in. Such information transfers and limitations could make the integrated platform operator more competitive than its competitors operating on its market place.

The Franco/German Study cites no EU sources for the proposition that discrimination in providing access should be treated as a separate violation from a refusal to provide access, but it cites a French case in which Cegedim, which was dominant in the market for medical information databases in France, refused to sell its OneKey database to customers using the software of Euris, a competitor of Cegedim on the adjacent market for customer relationship management software in the health sector. The French Competition Authority concluded that Cegedim's behavior represented an abuse of its dominant position. Cegedim could be analyzed as a traditional tying case, however, since Cegedim was dominant in a market for the provision of third-party data, and it tied access to its dominant database to use of its non-dominant data analytics software, foreclosing competition in that market.

The Franco/German Study also cites the Commission's investigation of Google's comparison shopping services, where the Commission claims that Google systematically favours its own comparison shopping service over competitors’ in its search result pages. In this case, however, the Commission does not allege that Google discriminates in the provision of access to data, but rather that Google's favouring of its own comparison shopping service stifles innovation and leads to users not necessarily seeing the most relevant search results.

It is not clear from the Franco/German Study’s analysis or the examples it cites why discriminatory provision of access to big data should be viewed as a separate antitrust violation compared to a refusal to provide access, as discussed above. In particular, if a vertically integrated platform could use customer information to adjust its product range and pricing more efficiently than a non-vertically integrated retailer, that advantage, by itself, would not create an obligation for the vertically integrated platform to share its data with any non-vertically integrated retailer.

**Exclusive contracts**
The Franco/German Study argues that exclusive agreements or networks of agreements involving data access may infringe antitrust laws if they prevent rivals from accessing data or foreclose rivals’ opportunities to procure similar data by making it harder for consumers to adopt their technologies or platforms.

The Franco/German Study notes that the European Commission has alleged that Google’s practice of entering into exclusive contracts in the search advertising market might infringe Article 102 TFEU, because these agreements foreclose competitors from being able to challenge the company. From the Commission’s public statements in this case, however, it doesn't appear that the Commission alleges that Google used exclusive contracts to prevent rivals from accessing data or foreclosing rivals’ opportunities to procure similar data.

Exclusive contracts in relation to big data could, however, give rise to antitrust concerns in two situations. In relation to the supply of data, a dominant third-party data supplier could use exclusive contracts with its customers to foreclose competition from other third-party data providers. In this scenario, however, the fact that the product market involves big data would not seem to raise any novel issues.

In relation to data collection, exclusive contracts or networks of contracts could potentially foreclose competition by third-party data providers or companies collecting first-party data on other natural or legal persons, such as platform users or consumers. The potential for individual exclusive contracts, or a network of exclusive contracts, to interfere with competitors’ access to data would need to be assessed in light of the substitutability of different types of data for the same purpose, the potential sources for each type of data and the purpose for which the data are required.

As discussed above, the substitutability of datasets can be difficult to assess. For instance, foreclosing access to data from one population of users may not affect competition to develop products where big data are important but the identity of the data provider is not, such as developing search algorithms, spell-check programs or voice-recognition software. In applications where users’ identity is important, such as individually targeted advertising services, the competitive effect of exclusivity in agreements providing for the collection of data from third parties would need to be assessed in light of the population of potential users, the availability of substitutable data.
from other sources (for instance as a result of multi-homing), the duration of any contractual exclusivity, and how quickly the value of the data in question diminishes over time.

**Tied sales and cross-usage**

Several authorities warn that tying sales or “cross usage,” i.e., the use of data collected on a given market in another market, can have foreclosing effects. The Commission will normally take action in such cases where an undertaking is dominant in the tying market, the tying and tied products are distinct products, and the tying practice is likely to lead to anti-competitive foreclosure.

In the big data context, a tying issue would only arise where the data in question are offered as a product for consideration, i.e., in relation to third-party data. Indeed, the *Cegedim* case cited by the Franco/German Study as an example of discriminatory access could be viewed as such a tying case involving third-party data, as discussed above. In the case of “cross usage,” it is not clear why any foreclosure or exclusionary issue would arise unless accompanied by a refusal by a dataholder to give access to data that can be used in more than one market, as discussed above.

**Discriminatory pricing**

Data is also said to facilitate price discrimination, since companies with market power who collect data about their clients’ purchasing habits may be better able to assess their willingness to pay for a given good or service and to use that information to set different prices for different customers. The Franco/German Study notes that price discrimination can be defended on economic efficiency grounds and queried whether “price discrimination in itself is within the scope of European competition law” and suggested that national competition law may be more likely to apply.

Price discrimination is in fact within the scope of EU competition law, though it is not a priority enforcement area addressed in the Commission’s Exclusionary Practices Priorities. In Clearstream, the General Court upheld a Commission decision finding that Clearstream’s charging of a higher price to Euroclear Bank for equivalent clearing and settlement services than to national central securities depositaries constituted discriminatory pricing prohibited by Union law.
In the big-data context, similarly, a company that is dominant in a market for the provision of third-party data could be found in violation of Article 102 TFEU. This theory of harm, however, would not apply to first-party data or to the provision of third-party data by a company that was not dominant in a market for such data.

The Franco/German Study seems to contemplate a different concern, that the use of first-party data could facilitate discriminatory pricing by a dominant company in a different product or service market by enabling such companies to better assess their customers’ willingness to pay for their products and services. The Franco/German Study’s comments on the potential efficiencies to be derived from such practices may reflect a doubt about whether discriminatory pricing by dominant companies should be prohibited under EU law, but this issue is beyond the scope of this article.

**Conclusion**

This article examines big-data theories of harm advanced by European antitrust authorities in light of the characteristics of different types of data and the ways companies use it. This approach reveals that the risk of data creating a barrier to entry or market power depend on the type of data involved and the characteristics that affect its value in different contexts.

For example, where third-party data are offered as a product, the fact that the seller holds such data doesn’t create a barrier to entry, although the data’s cost could constitute a barrier, as with any input. In markets for third-party data, dominant companies may engage in exclusionary practices, as in any market. Of the theories of harm raised in the Franco/German Study, tying, exclusive contracts and discriminatory pricing seem most likely to arise in relation to third-party data.

In the case of first-party data, the fact that a company collects on its own assets, products or services seems unlikely to raise barriers to entry or create market power. The cost and expertise required to collect and use such data could be a barrier, as with any input, but any barrier would not derive from the data as such, and a company’s use of such data should not give rise to any exclusionary concerns.

On the other hand, first-party data collected on others, such as a company’s customers, could in principle create a barrier to entry. However, the competitive significance of such data varies depending on the availability of substitutable data, the volume of data required for the desired purpose and how quickly the data’s value diminishes over time. Authorities lack clear tools to assess the substitutability and value of data across a range of markets, each of which must be evaluated on a case-by-case basis. In any event, the fact that a particular dataset is unique or non-replicable, in itself, is not necessarily an indication that big data raise barriers to entry or create market power.

Only in the narrow situation where a dataholder is found to have a dominant position in a relevant market, the data it collects on other persons contributes to its market power, and the dataholder is abusing its dominant position, would the question of mandatory access arise. Mandatory access to data could be a suitable remedy if the data constituted an essential facility meeting the criteria set out in the European Court of Justice’s *Microsoft, IMS and Bronner* judgments. In this context, exclusive contracts or networks of contract to procure data could potentially have foreclosure effects. By contrast, other exclusionary theories of harm raised in the Franco/German Study, including exclusive customer contracts, tying and discriminatory pricing, would not be expected to arise in the first-party data context.

As they develop their thinking on big data issues, antitrust authorities will need to look more closely at the substitutability of different types of data for different purposes and the role of related but distinct factors such as the availability of algorithms or other software to process such data. Meanwhile, a simplistic focus on whether data are unique or non-replicable risks provoking an overly broad legislative reaction. In particular, the European Commission’s proposal to require companies to share any non-personal, machine-generated data they collect could apply to huge volumes of first-party data companies collect on their own assets, products and services, even though such data are among the least likely to create barriers to entry or contribute to abuses of dominant positions. Imposing such a broad access obligation could chill innovation and investment in a critical period in the evolution of big data practices.

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In December 2016 the UK Competition and Markets Authority (CMA) used its statutory powers to disqualify a person – Daniel Aston, a director of Trod Limited – from being a company director. The CMA found Trod Limited guilty of having entered into an agreement with its competitor, GB eye Limited, not to undercut each other’s prices for posters and frames sold on Amazon UK’s website. The CMA determined that both Mr Aston’s position as Managing Director at the relevant time and the fact that he personally contributed to the breach of competition law meant his conduct rendered him unfit to be a company director. He was disqualified for five years.

This is the first time the CMA has exercised its power to disqualify a director as a result of a breach of competition law since the rules were introduced in 2003. Some commentators have dismissed the action as a “one-off”, citing the fact that Mr Aston was a sole director who was clearly responsible for instigating and maintaining a cartel as evidence that he was an easy target – in effect, suggesting that the CMA could hardly not disqualify him given the circumstances. But, we suggest it would be wrong to dismiss this action as being the exception to the rule. Having cut its teeth on what was undoubtedly a relatively straightforward case, the CMA has indicated that it is “absolutely prepared to use this power again” and we have every reason to expect it will do so.

In this article, we summarize the UK rules on directors disqualification for competition law breaches, we explain why these are important and identify what steps directors can take to protect themselves. We then examine how similar rules are applied in other jurisdictions.

**UK rules on director disqualification for competition law breaches**

In the UK, under section 9A to 9E of the Company Directors Disqualification Act 1986, as amended, the CMA has the power to seek the disqualification of an individual by applying to the court for a competition disqualification order (CDO) or by accepting a legally binding undertaking from a director (CDU), from holding company directorships or performing certain roles in relation to a company for up to fifteen years where that individual has been director (or de facto director) of a company which has breached either UK or EU competition law (excluding merger control).

The court must make the order against a person if (i) the director’s company commits a breach of competition law, and (ii) the court considers that person’s conduct as a director makes him or her unfit to be concerned in the management of a company. The second condition includes situations where the director did not know but ought to have known that the conduct of the undertaking constituted a breach.

It is a criminal offence if a person contravenes either the CDO or CDU and is punishable by imprisonment of no more than two years and/or a fine. Furthermore, any contravention would expose the director to personal responsibility for all the debts and liabilities of the company incurred during the time when he was involved in the management of the company.

**Why should directors be worried?**

The threat of disqualification was originally introduced to act as a powerful deterrent against anticompetitive behavior, motivating directors to embed a “top-down” compliance culture with competition law. Indeed, a decade ago the CMA’s predecessor, the OFT, commissioned a study which found that companies’ average ranking of the factors that motivate compliance from highest to lowest were: (1) criminal penalties (2)
disqualification of directors (3) adverse publicity (4) fines and (5) private damages actions. 

Given the authorities’ failure to exercise these powers over the past decade, and the rise in private damages actions over a similar time frame, we might now expect to see a reversal in the relative positions of these particular factors. However, having succeeded in securing a CDU from Mr Aston, the CMA has renewed confidence in this deterrence tool. Indeed it is hard to see why it hasn’t been better utilized in recent years given there is no need for (a) a trial; (b) the director to have personally breached competition law – inaction in respect of the conduct of their employees is sufficient; or (c) the authority to demonstrate that the individual was aware the conduct was a breach of competition law. We therefore expect the CMA to catch more individuals going forwards.

What can directors do to protect themselves?

In order to protect themselves against the threat of personal sanctions, directors must be able to demonstrate that they have taken reasonable steps to prevent breaches of competition law by your company and its employees. This includes

- Training: you must check that appropriate training is being provided to ensure that employees are aware of the types of actions that could breach competition law.

- Maintaining fit-for-purpose compliance procedures: you must maintain appropriate competition compliance procedures and policies and ensure these are enforced.

What if my remit as a director extends outside of the UK?

You may of course be responsible for managing your company’s business affairs in numerous countries, operating as a regional directors. If so, you ought to consider your potential liability in these jurisdictions.

Competition disqualification regimes tend to fall into two categories (i) jurisdictions that provide for individual disqualification for competition law breaches as a stand-alone sanction, or (ii) jurisdictions that make disqualification contingent on being found liable for a criminal law offence for breaching competition laws.

European competition law does not provide for any sanctions against individuals, however, the national authorities of EU member states may decide to make provisions in national law to allow for competition disqualifications/debarments of individuals. In the EU, the UK and Sweden are the only countries to have a stand-alone competition disqualification sanction. Whereas Estonia, Germany (exclusively in the case of bid-rigging), Ireland, Romania and Slovenia are examples of countries which all fall under the second category, operating contingent regimes.

Further afield, the trend is strongly in favour of stand-alone regimes, for example in Hong Kong, New Zealand, Russia and Brazil, although South Africa has recently adopted a contingent regime. The United States does not currently have a formal competition disqualification mechanism, however, there has been extensive commentary about its introduction. A movement towards greater introduction and enforcement of disqualification sanctions for competition law breaches seems to be emerging, with both Ireland and South Africa implementing their new legislation as recently as 2016.

Conclusion

The increasing scope and level of enforcement of director disqualification both in the UK and around the world makes it vital that directors understand both competition laws and the associated risks. In particular, directors should ensure their company and/or in-house legal team are providing them with support to facilitate implementation of adequate competition compliance procedures, policies and training. Directors should also familiarise themselves with the relevant jurisdictions and regimes to which they are exposed in their role as director, and where necessary seek local legal advice.

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Significant changes to German competition law: New revised act against restraints of competition entered into force

On June 9, 2017, the 9th Amendment Bill to the German Act Against Restraints of Competition (“ARC”) entered into force. While the primary focus of the 9th Amendment Bill concerns the implementation of the requirements set out by EU Damages Directive (No. 2014/104/EU), thereby strengthening private enforcement through damages claims, the bill also closes certain gaps with respect to the enforcement of fines imposed on undertakings involved in antitrust law infringements, brings about significant changes to the German merger control regime, clarifies certain aspects regarding the general application of antitrust law, and transfers specific powers in certain areas of consumer protection to the German Federal Cartel Office (FCO), all of which follow the legislator’s secondary focus on emerging and digital markets.

In some of the aforementioned areas of competition law, the 9th Amendment Bill also addresses the application of the ARC to certain industry sectors, such as newspapers and magazines, food retailing and banking and finance, as further outlined below.

In summary, the most relevant changes are

- The rights of leniency applicants are strengthened and secured, e.g. the introduction of liability privileges and exemption from disclosure proceedings.
- Gaps previously enabling companies to escape from fines imposed in antitrust proceedings are now closed.
- An EU-wide first “value of transaction” based turnover threshold (€400 million) is introduced.
- A general clarification is added that products and/or services provided at no cost in markets are also subject to competition law.

In more detail:

**Strengthening private enforcement through cartel damages claims**

The implementation of a set of new rules on cartel related damages claims in Section 33 (ff) and 89 (ff) of the ARC is likely to make Germany an even more attractive jurisdiction for follow-on actions. The new rules contain the following key aspects:

**Disclosure of evidence**

Firstly, new rules on disclosure have been introduced to address concerns around the burden of proof and information asymmetry. This is because under the existing German Code of Civil Procedure the burden of proof lies with the claimant, which typically has limited information about a cartel (compared to the members of the cartel). Therefore, in contrast to the US, German law made it difficult for claimants to obtain and bring the necessary proof in court proceedings, despite some presumptions having been developed in the case law. The newly introduced Section 33(g) of the ARC, among other things, entitles any party that can potentially bring damages claims resulting from cartel law infringements to access relevant evidence or information. This right exists even prior to the initiation of legal proceedings: meaning claimants can request the disclosure of important evidence/information from potential defendants or anybody else. Claimants must however specify the information required and are not entitled to receive business secrets or evidence generated in leniency or settlement proceedings. Disclosure is also subject to an overall test for proportionality. A further key point to note is that the new German ARC does not strictly exclude the courts themselves from requesting disclosure of evidence submitted under leniency programs.

**Extension of the limitation period**

Secondly, both the limitation period in which cartel damages claims can be brought and the starting point for calculating the limitation period for such claims have been adjusted in favour of claimants. Critically, the regular limitation period – which is dependent on the claimant having...
knowledge of the harm – has been extended from three to five years (Section 33(h) of the ARC). Where the claimant had no knowledge, the limitation period remains at ten years. In both cases, however, the clock only starts running when the competition law infringement ended. This is significant as it potentially delays the limitation period in the case of long-lasting infringements over and above the general ten year period.

The new statute of limitations will apply to all claims that arose or will arise after December 26, 2016 as well as to any prior claims relating to a breach of Article 101 or 102 TFEU, of Section 1–47 of the ARC, or of an order of a competition authority that has not been time barred by June 9, 2017. In the latter case, the start date, suspension, and restart of the limitation period for claims that arose prior to December 27, 2016 will be subject to existing rules up to and until June 9, 2017.

In the case of investigations by competition authorities or other standalone civil litigation according to Section 33g ARC, the Amendment Bill extends the period under which the limitation is suspended from six months to one year after the final end of such proceedings.

Presumption of damages and passing-on defense

Thirdly, Section 33(a) paragraph 2 of the ARC introduces a rebuttable presumption that the cartel did cause damage, especially in the most evidently harmful cases, e.g. market sharing or price fixing.

Additionally, a new rule concerning the passing-on defense has been incorporated in the ARC. The new law presumes that indirect purchasers bear the cost of the increased cartelised price if they can show that they bought products or services which have been overpriced due to an infringement of Article 101 or 102 TFEU or Section 1 or 19 of the ARC. This presumption only applies in favour of indirect purchasers, and does not apply for any party which has participated in the competition law infringement in question. It is also important to note that this presumption only relates to the question of whether passing-on generally occurred and does not specify the extent to which it occurred.

Take-Away: While under the new ARC regime the leniency applicant and the information provided in the leniency application are better protected against disclosure, the general effect of the new law is to weaken the position of cartelists. This is because the five year limitation period now starts at the end of the infringement and because anybody potentially damaged by a competition law infringement can now file for disclosure, even before bringing legal proceedings.

So-called “sausage gap” closed: new rules on joint on several liability

The 9th Amendment Bill closes a well-known gap in the law that allowed companies to avoid fines being imposed by the FCO through (internal) restructuring, in particular, through undertaking asset deals or where the company that had been fined ceased to exist. This issue has attracted a lot of attention in Germany due to a high-profile case where a sausage-making company was able to escape a fine imposed by the FCO – hence the term the “sausage gap”.

The new Section 81 paragraphs 3(a) – 3(e) of the ARC addresses the issue by introducing group-wide liability, and new rules on commercial succession, as follows

- In accordance with the EU law concept of an “undertaking”, paragraph 3(a) provides for joint and several liability of all group companies that, directly or indirectly, exercised control over the company immediately responsible for a breach of competition laws, without there being any requirement to prove any form of breach by the controlling entities (whereas previously there had been a requirement to prove e.g. a breach of supervisory duties).

- Additionally, paragraphs 3(b) and 3(c) provide for liability of succeeding companies not only in the case of universal succession but also in case of economic continuity, again giving effect to the EU antitrust law concept. Where the originally liable company ceases to exist, the successors may be fined and the amount of this fine will – no longer – be limited to the value of the assets/company acquired. For a transitional period, the new rules on liability are accompanied by contingency provisions which provide for liability of all group companies that, directly or indirectly, exercised control over the company immediately responsible for a breach of competition laws, as well as, for separate procedures against parent companies.

In addition, three exemptions are introduced to the provisions concerning joint and several liability of all parties to an infringement of competition law with respect to damages.
• First, undertakings that received full immunity from fines are liable only towards their direct or indirect purchasers or suppliers. Liability towards other claimants exists only where full compensation cannot be obtained from the other parties to the infringement (Section 33(e) of the ARC).

• Next, small and mid-sized enterprises’ liability is also limited to direct and indirect purchasers or suppliers where their market share was below five per cent during the entire infringement period and the duty to provide full compensation would irrevocably put the company’s existence at risk.

• Finally, where an infringer settles with a claimant, the infringer, enjoys general exemption from (further) joint and several liability where compensation of any outstanding amounts can be obtained from the other parties to the infringement, (Section 33(f) of the ARC).

Take-Away: Although certain benefits are available for the first leniency applicant, the enhanced rules applying joint and several liability for all parties to an infringement, including any parent and other controlling group companies, will make it difficult for infringers to avoid paying fines or damages and is, thus, likely to strengthen both, public and private enforcement. Since the introduction of group liability for fines absent any negligence or fault on the part of the parent or other controlling group companies is a clear departure from the traditional German liability system, we expect the new laws to be subject to extensive discussion and challenge before the courts.

New merger control regime

The Amendment Bill introduces to the German merger control system a transaction-value based threshold of €400 million and above. This means that, in addition to transactions which satisfy the existing thresholds, any transactions that constitute a merger in the meaning of Section 37 of the ARC are also subject to mandatory pre-notification to the German FCO if

• The worldwide turnover in the preceding business year of all companies involved surpassed €500 million.

• In Germany in the preceding business year
  — At least one undertaking being party to the transaction achieved a turnover exceeding €25 million and
  — Neither the target company nor another party to the transaction achieved in the same period a turnover above €5 million, each.

• The value of the consideration for the transaction amounts to more than €400 million.

• The target company is active in Germany to a “substantial” extent.

In effect, the transaction-value threshold from now on constitutes an alternative threshold to the second domestic turnover threshold of €5 million.

The reason for the introduction of this new value-based threshold was the acquisition of sole control by Facebook over WhatsApp, a concentration which almost escaped merger control procedures in the EU, since WhatsApp did not meet the turnover thresholds in many jurisdictions. However, the new rules are not necessarily straightforward. While the Amendment Bill specifies that generally the purchase price and connected monetary value, as well as, the takeover of liabilities from the seller are considered to be a good proxy for the consideration or the value of the transaction (Section 38 paragraph 4(a) of the ARC), it will no doubt be difficult in complex transactions to place a figure on this value. In addition, the concept of “substantial” activities is intended to be broad, as can be seen from the explanatory notes accompanying the draft bill to the 9th Amendment Bill, and the “local” nexus should not be interpreted too narrowly. Much attention will therefore be paid towards how the new rules are applied in practice, not least because of the suggestion that amendments might also be made to the EU merger control regime to follow Germany’s example.

In addition, an exception for small parts of the banking sector from merger control has been introduced in Section 35 paragraph 2 of the ARC. While this is likely to apply only to certain back-office services in the banking industry, this is nevertheless a welcome addition.

Finally, in the newly amended ARC, minor changes to the procedures concerning ministerial approval in cases where the FCO has prohibited mergers have been introduced. These follow a prominent case in the retail food sector (the acquisition of Kaisers by EDEKA) which was cleared by ministerial approval but only after having been subject to judicial review and wider public debate. Henceforth, if ministerial approval is not given within six months then the deal is effectively blocked. While there was no parliamentary majority to change the ministerial approval into a parliamentary approval – as publically discussed – the Amendment Bill nonetheless strengthens the role of the German Monopoly Commission by affording it the right to be heard...
in a public oral hearing to explain its position. In addition, if the Minister for Economic Affairs and Energy does not follow the recommendation given by the German Monopoly Commission, it must state its reasons why. Finally, the general German rules on administrative procedures are also now applicable to these proceedings which will be subject to new guidelines, albeit these are yet to be published by the Ministry for Economic Affairs and Energy.

**Take-Away:** For the first time in German merger control – and indeed in Europe – a transaction-value based threshold has been introduced which is likely to significantly increase the number of transactions subject to mandatory merger control review. This is particularly so because of the expectation that the FCO will interpret the new local nexus test broadly.

**Clarifications, especially with respect to digital markets**

Following repeated discussion among academics and in the light of inconsistencies in the case law, Section 18 paragraph 2(a) of the ARC now confirms that a “market” – in so far as this term is used within competition law – can also exist where products and/or services are provided free of charge. This clarification follows an initiative by the FCO to better understand and tackle competition issues in digital markets, which led to the publication of a Working Paper on “Market Power of Platforms and Networks” in June 2016. Consequently, Section 18 paragraph 3(a) of the ARC now provides certain specifications on the assessment of market power with respect to multi-sided markets and networks, listing, among other things, network effects and access to market relevant data.

Other new rules for dominant undertakings concern granting “advantages” without objective and transparent justification (Section 19, paragraph 2, No. 5 of the ARC) and selling goods – especially food – at below cost prices (Section 20, paragraph 3 of the ARC). Both amendments are designed to strengthen competition, and are particularly directed at the food retail sector in Germany, which is characterized by high levels of concentration (basically being controlled by four main players).

In addition, the 9th Amendment Bill introduces an exemption from the cartel rules for certain forms of cooperation between publishers of newspapers and magazines, provided the coverage is national-only and does not include editorial work (Section 30, paragraph 2(b) of the ARC).

**Take-Away:** The new rules reflect the recent focus of the FCO’s activities and investigations in the food-retail industry and in digital markets; at the very least, we expect the latter to remain among the authority’s top priorities in the next few years.

**Federal Cartel Office is given a new competence of consumer protection**

The FCO is given a new competence to protect consumers in the case of significant, continuous and repeated infringements of consumer protection laws that affect a large number of consumers by their nature or extent. This task can be only assumed if there is no other competent federal agency. In this case only, the FCO will be able to conduct sector inquiries according to Section 32(e) of the ARC.

**Take-Away:** The FCO is expected to test its new competencies soon, following the investigations against Facebook with respect to an alleged abuse of its dominant position through conditions of use in violation of data protection provisions.

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Agent v Principal?  
Agency in Australian competition law

A recent decision by the High Court of Australia found that an agent may be in competition with its principal where certain features arise, such as the agent having the freedom to set its own prices or prioritize its own interests over those of its principal. In the case of ACCC v Flight Centre Travel Group Ltd (2016) 339 ALR 242, the High Court found that Flight Centre Travel Group Ltd (Flight Centre) was in competition with airlines in the market to supply international airline tickets.

As a consequence, companies that operate through agency relationships in Australia should consider whether they may be seen to be in competition with their agent or principal, and whether, as a result, any of their current agency agreements or understandings could be seen to be anti-competitive.

Background

This case was brought by the Australian competition regulator, the Australian Competition and Consumer Commission (the “ACCC”), against Flight Centre.

Between August 2005 and May 2009, Flight Centre, a leading travel agency business listed on the Australian Stock Exchange, was authorized to sell tickets of various airlines (including Singapore Airlines, Malaysian Airlines and Emirates) under a Passenger Sales Agency Agreement (the PSAA). Under the PSAA, Flight Centre was authorized to sell international airline tickets, paying the airline a nett amount calculated by reference to a published amount which also included an allowance for the travel agent. But the travel agent was not bound to sell a ticket at the published rate – it could sell a ticket for more, or less. The higher above the nett amount that Flight Centre could sell a ticket for, the greater its profit, and vice versa. Relevantly, the PSAA did not exclude the airlines from also directly selling their own tickets.

Over the same period, Flight Centre offered a “price beat guarantee”, whereby Flight Centre would beat the price quoted for a ticket by another party, including by an airline on its Australian website.

This created commercial difficulties for Flight Centre when each of Singapore Airlines, Malaysian Airlines and Emirates sold tickets directly to customers at prices less than the nett amounts.

In response to the airlines’ prices, a series of emails were sent on behalf of Flight Centre attempting to stop the airlines selling tickets at the lower prices, threatening that Flight Centre would stop selling their tickets unless they complied.

The ACCC alleged that this behavior contravened section 45(2)(a)(ii) of the Trade Practices Act 1974 (Cth) (the Act), by proposing an arrangement or understanding containing a provision which had the purpose and/or was likely to have the effect of fixing or controlling or maintaining prices for the supply of the services which Flight Centre and the airlines were selling in competition with each other.

The most controversial element of the ACCC’s allegation was whether Flight Centre was actually in competition with the airlines, which turned on the following issues:

- Market definition
- Whether the agency relationship meant that the agent was not in competition with its principal.

The market

The ACCC put forward two alternative cases in relation to the market. First, that Flight Centre and the three airlines competed in a market for the provision of flight distribution and booking.

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1 Together with the deeming provision in section 45A(1) of the Act regarding contracts, arrangements or understandings in relation to prices. The Act has since been renamed the Competition and Consumer Act 2010 (the Act), with section 45A(1) repealed and replaced with specific prohibitions in relation to cartel provisions which are in similar effect but carry with them more severe potential consequences, including imprisonment.
services, and secondly, that they competed in a market for international passenger air travel services.

At first instance, the Federal Court of Australia accepted the first proposition and rejected the second, saying that only the airlines supplied flights as they operated the aircraft.

Flight Centre successfully appealed to the Full Federal Court, where the ACCC’s alternative cases were both rejected.

But there was a reversal of fortune when the matter was taken to the last point of appeal, the High Court of Australia, which accepted the second of the ACCC’s alternative cases, albeit describing the market differently as the “supply of contractual rights to international air carriage to customers” (as opposed to the performance of that contractual right), or more simply, the supply for international airline tickets.

The first of the ACCC’s alternative cases was again dismissed, with the attempt to construct the fact that an airline sells tickets directly to its customers as the airline providing itself with a “distribution service” being described as “quite artificial”. The Court commented that the booking of a flight, the issuing of a ticket and the collecting of the fare could not be treated as separate elements when they were in fact inseparable elements of the sale of a ticket.

When will an agent be in competition with their principal?

The most contentious point of this case before the High Court was the interaction of the laws of agency and competition. As noted in Chief Justice French’s dissenting opinion, “the characterisation of Flight Centre as a competitor of the airlines ... was necessary in order to establish the contraventions alleged”.

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Justices Keifel and Gageler decided that notwithstanding the fact that Flight Centre was acting as the airlines’ agent, it was free to prefer its own interests over those of the airlines, to set its own price for the tickets, and to decide whether or not to sell the tickets at all. To the extent that the agent was free to act, and act in its own interest, they declared that “the mere existence of the agency relationship did not in law preclude the agent from competing with the principal for the supply of contractual rights against the principal”. In a separate judgment, Justice Gordon added that Flight Centre was engaging in rivalrous behaviors in its own right without reference to the interests of the airlines, thereby not acting as agent but as a competitor.

Thus, the majority decided that where certain factors were in play, such as the agent having freedom to set its own prices and prioritize its own interests over those of its principal, an agent can be in competition with its principal. In this case, they found that Flight Centre was in competition with the airlines in the market to supply international airline tickets.

Chief Justice French dissented, saying that the idea that Flight Centre and the airlines were competing “assumes a concept of competition under the Act which is in tension with that of an agency relationship at law”. He focussed on the legal concept of agency, quoting the maxim “he who does an act through another does it himself”. He acknowledged that in the trade and commerce context, the term “agent” may not mean an agent at law, but that this was not the case for Flight Centre – Flight Centre was not a broader, “commercial agent”, but a legal agent. Chief Justice French said that the relevant activity in this case, the sale of contractual rights to travel on the airlines, lay at the “heart” of the agency arrangement in question. The Chief Justice concluded his dissent by noting that “in relation to the supply of contractual rights Flight Centre’s conduct is properly to be regarded as that of the airline”.

**Commercial impact**

The finding that an agent can be in competition with its principal (in certain circumstances), will mean that agents and principals in all industries may need to be more careful about their relationships and interactions. While the Flight Centre case focused on price fixing, agents and their principals could be found to engage in anti-competitive behavior in other aspects of their relationship as well – for example, in relation to the allocation of distribution zones.

Furthermore, the circumstances in which an agent and principal are found to be competing may broaden in the future. In the Flight Centre case, the agent’s freedom to set prices was found to be a compelling factor in proving that the agent and principal were in competition. Even in more tightly contracted agency relationships, where an agent does not have the ability to set their own prices, other freedoms could potentially be used to demonstrate that an agent and its principal are in competition. For example, if the agent sells the principal’s service on a more advanced technological platform, this could be seen as evidence of their being in competition with their principal. This in turn may call into question restrictions that exist as part of the principal and agent’s commercial relationship, such as the arrangements in relation to price.

We reiterate that companies that operate through agency relationships in Australia should consider whether they may be seen to be in competition with their agent or principal, and whether, as a result, any of their current agency agreements or understandings could be seen to be anti-competitive.

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