

ANTITRUST MATTERS

SEPTEMBER 2015



EDITORIAL

THE RISE OF CROSS-BORDER ANTITRUST INVESTIGATIONS: US, CANADA AND MEXICO ENFORCERS MEET TO DISCUSS EVEN CLOSER COLLABORATION

By Lesli Esposito and John Huh

Antitrust investigations are no longer limited to a nation's borders, or even to a region. Enforcers are more and more sharing information and coordinating their investigative efforts as they strive to uniformly enforce the antitrust laws.

This expansion was emphasized recently when the heads of the major North American antitrust enforcement agencies gathered for their annual trilateral meeting to discuss even stronger cross-border cooperation and coordination.

Key participants in the day-long Mexico City event: Assistant Attorney General Bill Baer of the Department of Justice's Antitrust Division, Chairwoman Edith Ramirez of the Federal Trade Commission, John Pecman from the Canadian Commission of Competition and Alejandra Palacios Prieto, the president of the Mexican Federal Economic Competition Commission.

The officials stressed the need for cooperation and coordination among the four agencies. The consensus among the antitrust enforcement agencies is that cross-border cooperation and coordination is now a necessity for effective antitrust enforcement. As Chairwoman Ramirez noted, "The need to cooperate across borders increases every year, and we are working together to meet that challenge." Assistant Attorney General Baer also stated the trilateral meetings provided the agencies with "a chance to review and improve our enforcement cooperation and to engage in policy dialogue on emerging topics of common interest."

Notably, the heads of the antitrust agencies discussed the possibility of involving antitrust enforcement agencies in South America, further expanding their efforts to coordinate and uniformly enforce the antitrust laws.

ENFORCEMENT PRIORITIES

The participants also discussed their current enforcement priorities, as well as the implementation of Mexico's new competition law, which substantially broadens the investigative powers of Mexico's competition enforcement agency, the Federal Economic Competition Commission. The enforcement agencies, particularly in the US. have prioritized investigating anticompetitive conduct, as well as scrutinizing mergers and acquisitions, in the technology, pharmaceutical and automotive industries. It can be expected that Mexico's involvement in such antitrust enforcement will grow with the implementation of its new competition law.

ANNUAL TRILATERAL MEETINGS

The annual trilateral meetings are largely a result of the antitrust cooperation agreements entered into by the US in 1995 and 1999 with Canada and Mexico, respectively, as well as an agreement entered into in 2001 by Canada and Mexico. The agreements generally provide that the various antitrust agencies will cooperate and coordinate with each other in order to increase consistency with respect to their antitrust policies and enforcement. In addition, Canada signed another agreement in 2014 with the FTC and the US Department of Justice on the Best Practices on Cooperation in Merger Investigations, which promotes effective coordination between the agencies.

The increase in international collaboration between the antitrust agencies in North America is further reflected in the recent statements of Russell Damtoft, Associate Director of the Office of International Affairs at the FTC, who noted that when it comes to work product, Canada's Competition Bureau and the FTC "can and do share quite often." The agencies, he added, also discuss confidential information that is not protected under the Hart-Scott-Rodino Act or other laws and regulations. Mexico's participation in these joint investigations is very likely to increase as well with the implementation of its new competition law.

COMPANIES DOING BUSINESS IN NORTH AMERICA MUST TAKE NOTE

For companies doing business throughout North America, the trilateral meetings are an important reminder that business practices must be compliant with the antitrust laws of the US, Canada and Mexico. The antitrust agencies in each of those countries are continuing to stress cooperation and transparency with each other.

If a company is being investigated by one country for a potential antitrust violation, the company should keep in mind that its conduct and statements could likely be relayed to the antitrust agencies in the other countries, and thus compliance across the board is essential. Antitrust policies and procedures must encompass laws, activities and practices throughout North America – and the need for businesses to comply will only expand should the enforcers succeed in their goal of coordinating with antitrust agencies throughout South America.

DLA Piper's Antitrust and Competition lawyers in the US, Canada and Mexico have extensive experience helping businesses address national requirements as well as the work of the enforcement agencies. Find out more by contacting any of the authors.





Lesli Esposito Partner **T** +1 215 656 2432 lesli.esposito@dlapiper.com





Catherine Pawluch Partner **T** +1 416 369 5272 catherine.pawluch@ dlapiper.com





Jorge A. Benejam T +52 55 5261 1892 jorge.benejam@dlapiper.com

CONTENTS

>	EUROPE	06		UKRAINE	
	FRANCE			Fresh start for the Ukrainian antitrust	19
	The European Court of Human Rights rules that dawn raids violate fundamental rights in France	07	>	AMERICAS	21
	NETHERLANDS			CANADA	
	Dutch court confirms legal basis for passing-on defence but considers it not reasonable to deduct any passed-on costs: GIS cartel	08		Canada adopts significant changes to foreign investment review framework	22
	NORWAY.			UNITED STATES	
	NORWAY Norway's mandatory pharmaceutical liability insurance –			"Don't leave home without it"? United States v. American Express	2.5
	in breach of EEA competition law?	10			
	Short news reports from Norway	12	>	ASIA-PACIFIC	27
				AUSTRALIA	
	ROMANIA			Agreements on penalties: an end to settling enforcement	28
	RCC issues first decision in a case triggered by a leniency application	14		proceedings with australian regulators?	
	UNITED KINGDOM		>	DLA PIPER RAPID RESPONSE APP	31
	FCA's guidance on its concurrent competition powers: the obligation				
	to report competition law infringements and other takeaway points	16	>	KEY CONTACTS	32





FRANCE

THE EUROPEAN COURT OF HUMAN RIGHTS RULES THAT DAWN RAIDS VIOLATE FUNDAMENTAL RIGHTS IN FRANCE By Jocelyn Goubet

Vinci Construction and GTM Génie Civil et Services (the applicants), have won their case against France before the European Court of Human Rights (ECHR), successfully challenging the circumstances under which seizures were conducted in their premises in 2007 by the Directorate-General for Competition, Consumer Affairs and Prevention of Fraud for alleged anticompetitive practices.

The key questions at issue: the legality of massive, undifferentiated seizures by reference to the right to a fair trial, and the right to respect of private and family life. The ECHR ruled that the seizures conducted by the administration were not proportionate to the objective pursued and, consequently, violated article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

During the raids, the ECHR noted, the applicants had not been given the chance to know the contents of the documents seized (particularly some of the employees' entire mailboxes), nor were they able to challenge the appropriateness of the seizures. As a result, the applicants were unable to object to the seizure of documents which did not fall within the scope of the investigation, including those that may have been covered by legal privilege. The ECHR held that the claimants should have at least been able to effectively challenge the lawfulness of these seizures after the inspections.

The applicants had identified and informed the French judge of the presence within the seized materials of correspondence covered by legal privilege. The ECHR held that by merely and briefly examining the formal context in which the illegal seizures were conducted, while at the same time acknowledging the existence of documents covered by legal privilege within the materials seized, the judge had not carried out the thorough, concrete examination which was expected of him.

Accordingly, the ECHR held that the right to the respect of private life guaranteed by article 8 of the Convention imposes that the judge "rule[s] on the fate of documents collected although they were unrelated to the investigation or were covered by legal privilege following a concrete proportionality test and if appropriate, to order their restitution."

In the absence of such a "concrete proportionality test", the seizures were deemed disproportionate to the objective pursued and, consequently, violated article 8 of the Convention.

This decision limits the government's ability to conduct digital seizures without allowing the investigated companies an effective way to challenge them, before or after the seizures, so that they have the opportunity to exclude any documents falling outside the scope of the investigation or covered by legal privilege from the seized materials.

It should be underlined that the methods of seizures in France have recently evolved with the introduction of temporary digital seals to allow investigated companies to request the exclusion of documents covered by legal privilege before the final digital seals are affixed.

This outcome increases the protection of the legitimate rights of companies. However, there is still room for improvement, since any seizure shall not only be subject to a concrete proportionality test to protect legal privilege, but also a test for the documents falling outside the scope of investigation.

Ref: ECHR, 5th Sect., 2 April 2015, n°63629/10, n°60567/10, Case Vinci Construction and GTM Génie civil and Services v/. France





Jocelyn Goubet Associate **T** +33 | 40 | 15 | 25 | 75 jocelyn.goubet@dlapiper.com

NETHERLANDS

DUTCH COURT CONFIRMS LEGAL BASIS FOR PASSING-ON DEFENCE BUT CONSIDERS IT NOT REASONABLE TO DEDUCT ANY PASSED-ON COSTS: GIS CARTEL

By Leon Korsten

For practitioners around Europe, the Gas Insulated Switchgear Cartel (GIS cartel) has been well known since 2007, when the European Commission (EC) imposed fines on 11 groups of companies for their involvement in this cartel. In April 2014, the European Court of Justice (ECJ) gave its final judgement on the appeal of Alstrom c.s., confirming the main findings of the EC.

In the Netherlands, the national electricity network operator, TenneT, took legal action against ABB and Alstrom to recover damages incurred by its legal predecessor Sep. On 24 September 2014, the District Court Gelderland decided that Alstrom is liable for the damages resulting from the GIS cartel. In this (partial) judgement, the court was not yet able to calculate the final amount of damages, and the parties to the dispute were invited to comment on a number of issues, including Alstrom's defence that the amount of damages should be lowered because TenneT had passed on the overcharge to its customers.

After the parties expressed their opinions, the court has now given its final judgement (ECLI:NL:RBGEL:2015:3713). This is the first case in which a Dutch court has come to a final decision on a passing-on defence raised by a cartelist.

PASSING-ON DEFENCE

In line with earlier Dutch case law, the district court ruled that an infringer of the cartel prohibition may successfully raise a passing-on defence. In this judgment, the district court provides further clarity as to the way in which this defence is to be assessed.

First, the court made clear which statutory provision of Dutch law (that was in place during the infringement) the passing-on defence can be based on. The Dutch court placed the passing-on defence in the context of the provision of mandatory deduction of collateral benefits (Article 6:100 Dutch Civil Code). This article states that if an action has not only caused damages, but also benefits, such benefits may be taken into account for assessing the damages, in so far as this is reasonable. This element of reasonableness plays an important part in the district court's judgement, as discussed below.

Second, the court held that on the basis of Dutch case law and the Directive on antitrust damages actions, the burden of proof that price increases have been passed on rests with the party relying on the defence (i.e. the infringer and defendant). The district court found that, in this case, Alstrom had not sufficiently argued that it was reasonable to deduct any benefits/passed-on costs from the damages incurred by TenneT.

The district court considered that on the basis of article 6:100 DCC, it must in principle be avoided that the infringer of the cartel prohibition compensates more than one party in the production chain for the same damages. Therefore, normally it can be considered reasonable to deduct passed-on damages from the compensation. However, the district court went on to consider that even if part of the damage has been passed on, there will not be a situation of double compensation if the TenneT's customers will not claim damages. Because, in this case, TenneT's customers are mainly consumers and it must, according to the district court, be considered very unlikely that those consumers will claim any damages with respect to the GIS cartel (or succeed in such a claim), the district court considered that Alstrom's passing-on defence should in this case be rejected. It added that even if consumers would claim any damages from Alstrom in future proceedings, Alstrom can then refer those consumers to TenneT, or it can bring a contribution action against TenneT to avoid having to pay double compensation.



In its assessment of the reasonableness of the passingon defence in this particular case, the district court also took into account that TenneT is fully owned by the Dutch State and that consumers are likely to benefit from the damages paid to TenneT, either in the form of lower electricity transport rates or in the form of lower taxes. In these circumstances, according to the district court, even if TenneT to some extent would be overcompensated, this should not be considered unreasonable. At any rate, the court concluded, such an outcome should be considered more reasonable than an outcome where Alstrom would be able to keep its illegal cartel profits, if it could benefit from the passing-on defence.

CONCLUSION

The decision of the District Court Gelderland is a landmark decision in respect of the passing-on defence. While the court accepts the passing-on defence in principle, it does seem to favour a very restrictive application of this defence, by holding that the defendant must convince the court that it is reasonable to deduct any passed-on costs from the damages claimed. Although the present judgement may be tainted to some extent by TenneT's position as a state-owned company and the fact that damages for consumers were very fragmented, the test of reasonableness favoured by the district court seems to provide the courts with a significant degree of discretion. It remains to be seen how Dutch courts will apply this test in future proceedings.





Leon Korsten Partner T +31 20 541 9873 leon.korsten@dlapiper.com

NORWAY'S MANDATORY PHARMACEUTICAL LIABILITY INSURANCE – IN BREACH OF EEA COMPETITION LAW?

By Katrine Lillerud and Christian Kjellby Nesset

This is a short version of a longer Norwegian article published in Scandinavian Insurance Quarterly issue 2/2015. The article has been translated and edited by Katrine Lillerud and Line Voldstad.

The statutory obligation is to insure that drug liability can only be met by one insurance option nowadays, excluding other possible players from this insurance niche. Under the statutory insurance scheme, membership in the Drug Liability Association is compulsory. In practice, this places the Drug Liability Association's solely owned company, the Norwegian Drug Liability Insurance AS (Ltd.), in a unique position. Small adjustments in current practice would open competition.

In 2003, the EFTA Surveillance Authority (ESA) found that the Norwegian Drug Liability Insurance Pool was limiting competition and accordingly was in violation of the European Economic Area (EEA) Agreement article 53 (TFEU 101). The Insurance Pool was abruptly abolished and replaced with an interim solution through the creation of the limited liability company Norwegian Drug Liability Insurance.

The intention was that the Drug Liability Association, which is responsible for and oversees compliance with the current statutory obligation, would enter into agreements with other market players, not just the Norwegian Drug Liability Insurance. This has not happened.

Twelve years later, the Drug Liability Association has now chosen to only provide coverage through agreements with the mentioned player. Has the Drug Liability Association neglected to invite other players to tender, or does this indicate a lack of interest in this niche product?

Because the system has not changed since the establishment of the interim solution, the only Norwegian pharmaceutical manufacturers' insurance option is still what the Drug Liability Association offers.

Norway's neighbors, Sweden and Denmark, have chosen different solutions. In Sweden, drug liability damages are covered by an insurance plan based on a voluntary agreement between the pharmaceutical manufacturers. In Denmark, private hospitals, private clinics and practicing doctors select insurance for specific treatments and examinations themselves. The experience with these solutions shows that there might be potential players and markets for other types of insurance solutions. Is the time ripe for alternative solutions in Norway?

Small adjustments could increase transparency and exclude the possibility of the Drug Liability Association exploiting its position. One solution to create greater

competition is to give members the opportunity to choose freely among several insurance offers which the Drug Liability Association has approved and/or collected. This may generate bids/interest from other Norwegian or international insurance companies. The solution only requires a change in current practice; no legislative changes would be required.

A more radical solution would be to provide drug manufacturers the right to choose and enter into an insurance agreement directly with the insurers. This approach requires a statutory amendment which abolishes the requirement of an obligatory membership in the Drug Liability Association.

Both solutions would open market access, increase competition and create a system that is in line with Norway's EEA Competition law obligations. Changes in the scheme would provide both Norwegian and international insurance companies an incentive to offer niche products in the drug liability insurance market in Norway for the benefit of Norwegian pharmaceutical manufacturers.



CONTACTS





Kjetil Johansen Partner **T** +47 2413 1611 kjetil.johansen@dlapiper.com





Katrine Lillerud Lawyer **T** +47 2413 1651 katrine.lillerud@dlapiper.com



Christian Kjellby Nesset Lead Lawyer **T** +47 2413 1656 christian.nesset@dlapiper.com



SHORT NEWS REPORTS FROM NORWAY

By Kjetil Johansen, Katrine Lillerud and Line Voldstad

MEDIA OWNERSHIP ASSESSMENT PROPOSED AND TRANSFERRED TO THE **COMPETITION AUTHORITY**

In the recent proposed amendment to the Competition Act, Norway's government proposes that media ownership shall be exclusively governed by the Competition Act.

The Ministry of Culture sets out that the purpose of the proposed changes is to simplify the regulations; making sure that the media businesses only need to deal with one set of rules and one authority in the assessment of mergers and acquisitions.

Media diversity is proposed to be included in the Competition Act in such manner that media ownership no longer needs to be subject to special regulation – meaning that (lack of) media diversity can be considered a harmful effect and constitute grounds for preventing a transaction due to loss of diversity and competition which undermines the quality to the consumers.

The Norwegian Competition Authority (NCA) shall, under the proposed regulations, consult the Media Authority as an expert body in media merger or acquisition cases.

Currently the proposed amendment to the Competition Act is subject to a consultation procedure; the deadline for submitting all comments is 29 September 2015.

CONCLUSION IN THE INVESTIGATION OF DOMINANCE: WHOLESALE DISTRIBUTION OF BEVERAGES

The NCA has concluded its investigation of dominance in relation to transition to wholesale distribution of beverages.

The investigation was initiated on the basis of a complaint made by the Consumer's Advisory Counsel on 17 April 2015. In the complaint the NCA was asked to prevent a distribution takeover from two breweries to Norgesgruppen. It was argued that the takeover could have been made possible by pressure from Norgesgruppen and that such pressure could constitute misuse of market power (dominance) in one or several markets.

No misuse of market power was found, as the NCA found no grounds for the allegations of excessive pressure in the distribution takeover processes in question.







Kjetil Johansen Partner **T** +47 2413 1611 kjetil.johansen@dlapiper.com





Katrine Lillerud Lawyer **T** +47 2413 1651 katrine.lillerud@dlapiper.com





Line Voldstad Lead Lawyer **T** +47 2413 1541 line.voldstad@dlapiper.com

ROMANI

RCC ISSUES FIRST DECISION IN A CASE TRIGGERED BY A LENIENCY APPLICATION

By Alina Lacatus and Alexandru Potlog

The Romanian Competition Council (RCC) has issued its first decision in a cartel case which was brought to the RCC's attention by a leniency application filed by one of the cartelists – a local entity pertaining to the Weatherford group.

This decision, issued in January 2015, is an important breakthrough for the RCC, which in recent years has been strongly promoting the leniency procedure in Romania's business community. This decision also sends an important message to companies encouraging them to consider applying for leniency, given that the leniency applicant in this case benefitted from full immunity from fines.

THE BACKGROUND OF THE CASE

The case concerned a cartel among five providers of oil and gas drilling services active on the Romanian market.

Based on the information provided by the leniency applicant, the RCC identified multiple instances of collusion between the cartelists in the interval from June 2008 to October 2009, during which they agreed to submit rigged bids in tenders for drilling services organized by the national company for natural gas (Romgaz, the incumbent producer and supplier of natural gas on the Romanian market).

The aggregated market shares of the cartelists covered approximately 75 percent of the relevant market, with the leniency applicant being the smallest of the five companies.

The actual bid rigging practices which the involved companies resorted to implied agreements prior to each tender organized by Romgaz as to which company would win the respective tender. In order to ensure the desired result was obtained, the other companies either refrained from submitting any bids or submitted courtesy bids which they knew could not be declared as winners.

EVIDENCE CONSIDERED BY THE RCC IN PROVING THE INFRINGEMENT

The information and documents provided to the RCC by the leniency applicant came into its possession upon the acquisition of control over a Romanian drilling company and the acquisition of another Romanian drilling company's assets.

Following the acquisition (during what the RCC decision suggests was a post-closing due diligence conducted by the purchaser), indications regarding the potential

participation of the companies in an illegal agreement were identified, and in this context the purchaser decided to apply for leniency.

In addition to the evidence submitted by the leniency applicant, the RCC also examined information and documents seized from the offices of the cartelists during dawn raids, which were found to confirm the allegations in the leniency application.

The key documents which substantiated the RCC's findings were handwritten notes taken by a representative of one of the cartelists during meetings which took place in 2008 and 2009. All the cartelists participated in such meetings, which were aimed at discussing and allocating to each cartelist the tenders expected to be forthcoming from Romgaz.

The RCC also identified enforcement actions taken by the cartelists against each other (in case the order for tender allocation was not observed), with support also from members of Romgaz's senior management team, which appear to have pressured the leniency applicant into withdrawing offers from tenders he was not meant to win.



OTHER KEY POINTS EXAMINED BY THE RCC

In addition to the appraisal of the infringement in light of the information and documents mentioned above, the RCC also touched on two important issues in this case:

■ How a company can distance itself from a cartel

The cartel initially involved the president of the board of directors of the company acquired by the leniency applicant. Pursuant to the acquisition, it was decided that the acquired company would participate independently in tenders, without prior coordination with the other cartelists

At this stage, enforcement actions were taken by the other cartelists. However, the RCC found that this is not sufficient evidence to document the company's exit from the cartel, considering that (i) no public communication was sent attesting to such exit and (ii) the respective company did not challenge subsequent tenders and continued to expect compensation for withdrawn bids.

■ The nature of information exchanged

Whilst the cartelists did not clearly discuss and agree on the commercial terms of each tender (the price to be offered by each company and other commercial conditions), the RCC found it sufficient that an overall agreement was reached with respect to the allocation of the tenders for the finding of an infringement, even if subsequently the commercial terms of each tender were set unilaterally by each company.

This is due to the fact that such unilateral price setting would anyway be subject to the initial agreement regarding the envisaged winner of each tender.

THE DECISION COULD HAVE IMPLICATIONS FROM A CRIMINAL LAW PERSPECTIVE

The sanctions applied by the RCC in this case ranged between 2.2 percent and 3.2 percent of the turnover of the concerned undertakings. However, the key issue raised by this case is related to its potential criminal implications.

The RCC has in recent years concluded multiple collaboration protocols with criminal authorities, and such collaborations have particularly focused on bid rigging practices in the context of tenders organized by Romanian public authorities and state-owned companies.

RCC officials have repeatedly stated publicly that, where public funds are negatively impacted by bid rigging practices, the RCC will team up with prosecutors to ensure that both companies and individuals are scrutinized and sanctioned where it is the case.

Under the Romanian Competition Law, designing and organizing an infringement of competition rules by a natural person acting as director, legal representative or otherwise exercising management functions in an undertaking qualifies as a criminal offense. Additionally, under the Romanian Criminal Code, as revised in 2014, bid rigging is also specifically incriminated.

It is not very clear at this stage if this decision will raise implications from a criminal law perspective as well for the persons involved. However, while so far there has been very limited case law in this respect in Romania, it can be expected that in the future more criminal cases will result from the RCC's bid rigging investigations.





Alina Lacatus Counsel T +40372155837 alina.lacatus@dlapiper.com





Alexandru Potlog Associate T +40372155841 alexandru.potlog@dlapiper.com

UNITED KINGDOM

FCA'S GUIDANCE ON ITS CONCURRENT COMPETITION POWERS: THE OBLIGATION TO REPORT COMPETITION LAW INFRINGEMENTS AND OTHER TAKEAWAY POINTS

By Alexandra Kamerling, Sarah Smith and Fabienne Dony

The Financial Conduct Authority (FCA) published its finalised guidance on its concurrent competition powers (Guidance) along with a Policy Statement which provides feedback on its Consultation Paper and the final rules which will be introduced as amendments to the Supervision Manual (SUP) of the FCA Handbook. The amendments to Part 15 of the SUP took effect from 1 August 2015.

The FCA obtained concurrent competition powers in relation to the provision of financial services on 1 April 2015 and the Guidance sets out how the FCA will exercise these new powers under the Competition Act 1998 (CA98).

While the Guidance and the Policy Statement deal with a number of issues, this client alert focuses on the following key takeaway points:

- self-reporting obligation
- right to appeal in settlement cases
- restriction on the use of information
- interplay with FSMA and
- other relevant procedural points.

SELF-REPORTING OBLIGATION

The most important amendment to the FCA Handbook is a new, specific competition law reporting obligation. The FCA currently requires regulated firms to disclose to it "anything relating to the firm of which the [FCA] would reasonably expect notice." This self-reporting obligation under FCA's regulatory Principle 11 is being extended to apply to competition law infringements.

Regulated firms must now notify the FCA if it has or may have committed a significant infringement of any applicable competition law as soon as it becomes aware, or has information which reasonably suggests, that a significant infringement has, or may have, occurred (Annex 1 (SUP 15.3.32)).

(a) Scope of the obligation

The scope of the self-reporting obligation is limited to significant infringements only. This materiality test makes the scope of the obligation less extensive than the original proposal, which covered all types of infringement irrespective of seriousness. However, the FCA only provides little guidance on when a matter should be regarded as significant, namely:

"[i]n determining whether a matter is significant, a firm should have regard to the actual or potential effect on competition, any customer detriment, and the duration of any infringement and implications for the firm's systems and control." A significant degree of uncertainty, therefore, remains as to when the obligation arises.

It is noteworthy that the new self-reporting obligation is not limited to infringements with a UK or EU nexus but to "any applicable competition law." However, this obligation is limited in at least two ways:

- the FCA notes that any breach by the firm outside of the UK and/or of non-UK or EU competition laws could still be relevant to the FCA as it may reflect issues with, for example, the firm's systems and controls, and/or fitness and propriety of the firm or individuals. It is therefore only in such circumstances that a foreign breach would fall within the scope of the Principle 11 disclosure obligation and
- the new self-reporting obligation under SUP 15 only applies to infringements in which the FCA-regulated entity (presumably including any of its subsidiaries) is involved.



(b) Content and form of the notification

The amended SUP handbook states that a notification of a (possible) competition law infringement should include the following:

- information about any circumstances relevant to the (possible) infringement
- identification of the relevant law and
- information about any steps which the firm or other person has taken or intends to take to rectify or remedy the infringement or prevent any future potential occurrence.

The above has the status of Guidance rather than being a Rule.

Notification must be submitted in writing unless the firm has or will make a leniency application in relation to the same subject matter, in which case it can be made orally.

(c) Interaction with leniency applications

Concerns were raised during the consultation phase that the self-reporting obligation could conflict with the voluntary nature of leniency applications to a Competition Authority. Given that a firm has to notify the FCA "as soon as" it has information about a possible infringement, the obligation may in practice force firms to make a leniency application at an earlier stage of an internal investigation than they otherwise would.

The FCA explicitly states that the self-reporting obligation must be independent of the voluntary activity of applying for leniency and emphasises that firms can meet the requirement of both the Principle 11 regime and the CMA leniency regime if they act promptly. The FCA also emphasises that the former does not require an admission of guilt.

In the light of the above, regulated firms will have to amend their competition compliance programmes to take account of the self-reporting obligation.

1. Right to appeal in settlement cases

One area where the FCA's approach to enforcement deviates from the CMA is the operation of settlements. In the interests of efficient and effective enforcement. the FCA can require parties wishing to settle CA98 cases with the FCA to waive their right of appeal to the CAT. The settling party may no longer have the opportunity to challenge any ultimate infringement decision even if it is reached on a different basis from the settlement agreement. In contrast, the CMA settlement procedure does not require settling parties to waive their rights of appeal.

2. Restriction on use of information

The FCA has the ability to accept leniency applications (applying the CMA's Guidance) but firms are expected to make leniency applications to the CMA because the FCA does not have concurrent powers in relation to the cartel offence and cannot grant immunity from prosecution in relation to this offence.

The FCA and CMA have agreed that leniency information which the CMA passes to the FCA may only be used by the FCA for the application and enforcement of the competition law prohibitions, unless the leniency applicant agrees otherwise.

This restriction on use also applies to any information obtained through an FCA CA98 investigation. Leniency information for these purposes is any information which came into the possession of any of the CMA, its predecessor bodies, or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency under the Chapter 1 prohibition or Article 101 TFEU. It includes any information obtained through an investigation resulting from the leniency application.

However, leniency information can also be used to remind a regulated firm of its self-reporting obligation under Principle 11 or, with regard to approved persons, Principle 4 of the FCA's Statements of Principle for Approved Persons, which requires an approved person to deal with the FCA, the PRA and other regulators in an open and cooperative way and to disclose appropriately any information of which the FCA or the PRA would



reasonably expect notice. This restriction does not affect the FCA's use of information obtained from other sources such as through Principle 11 disclosures.

3. Interplay with FSMA

The FCA has a broad range of legal tools to address competition concerns which include market studies under FSMA and EA02 or enforcement action under CA98 or FSMA. The FCA's guiding principle will be to choose the tool that will allow it most efficiently and effectively to investigate and if necessary remedy the possible harm that it has identified. Some cases (e.g. collusion amongst rivals to fix prices or allocate customers or unilateral strategic conduct by a firm to exclude rivals) are more likely to fall for investigation under the CA98.

The FCA can take enforcement action under its CA98 powers, and use its other powers in parallel or sequentially. For instance, anti-competitive agreements or abusive conduct by authorised firms may breach obligations under both FSMA and competition law. In exercising its powers the FCA has to respect the principle of proportionality, and take account of fines imposed by authorities in connected cases.

For more information on how the FCA chooses between the FSMA and EA02 market study regimes, please refer to the Market Study Guidance.

4. Other relevant procedural points

Legal counsel should also be aware of the following procedural points which have been clarified by the Guidance:

Case allocation: The Competition Act 1998 (Concurrency) Regulations 2014 sets out how cases will be allocated between the CMA and FCA. While the FCA will aim to agree on case allocation with the CMA, in the absence of agreement, the CMA has the final decision.

Division between investigation and supervision:

The FCA clarifies that its supervisory function under FSMA will continue as normal throughout any CA98 investigation. As a practical matter, investigation and supervision will be run by separate teams although with appropriate knowledge sharing to ensure efficiency. Regulated firms should therefore ensure consistency when they provide information to the FCA irrespective of the information gathering powers it is using.

Interim measures: The FCA can impose interim measures and will follow the criteria used by the CMA in deciding whether interim measures are justified.

Commitments: The FCA can accept commitments and will follow the CMA's approach of holding a meeting with the party offering commitments to set out the nature of consultations responses and to discuss amendments required to offered commitments.





Alexandra Kamerling Partner **T** +44 20 7796 6490 alexandra.kamerling@dlapiper.com





Sarah Smith Legal Director **T** +44 20 7796 6471 sarah.e.smith@dlapiper.com



FRESH START FOR THE UKRAINIAN ANTITRUST

By Galyna Zagorodniuk

NEW COMPOSITION OF THE ANTIMONOPOLY COMMITTEE OF UKRAINE

A number of significant reforms have taken place in Ukraine in recent years. Following a complete reboot of all state bodies – including the election of the President of Ukraine, Petro Poroshenko, as well as a new parliament and government – the Antimonopoly Committee of Ukraine (AMC) has been completely revamped.

This Ukrainian regulator consists of a head and eight state commissioners, who are appointed by the President for seven-year terms. For the first time since the AMC was established in 1992, the majority of its members have a business practice background. Some of them are well known professionals in the field of competition law, chairing competition law practices at well-known law firms. The new head of the AMC, Yuriy Terentiev, has been an in-house counsel of Ukrainian subsidiaries of multinational companies for almost 20 years. Along with his colleagues, the newly appointed state commissioners, he plans to reform the competition regulator and environment.

REFORM OF THE COMPETITION LEGISLATION

About the most significant problem with Ukrainian competition law is the extraterritorial effect of Ukrainian merger clearance, accompanied by extremely low financial thresholds. In Ukraine this approach, unfortunately, results in imposing form over substance, imposing the requirement of merger clearance on vast numbers of transactions: nearly 1,000 transactions a year. That is three times more than in Austria and is a number comparable to the number of applications in the entire United States. Clearly, this situation requires urgent correction. According to the existing rules, in fact, cross-border transactions, even those taking place outside Ukraine and having nothing to do with the Ukrainian market and competition, could well be caught. In particular, foreign-to-foreign mergers could be subject to Ukrainian merger clearance if at least one of the companies involved has a sufficient amount of sales or assets in Ukraine.

The financial threshold test requires the worldwide aggregate value of the assets of the seller's group and buyer's group or their aggregate turnover to exceed €12 million for the preceding financial year and the worldwide aggregate assets or turnover of at least two participants to the transaction to exceed €1 million each; in addition at least one of the participants must have Ukrainian assets or Ukrainian sales turnover exceeding $\in I$ million for the preceding financial year.

Simply put, any transaction between any two players of middle size elsewhere in the world could require merger clearance in Ukraine if at least one of the parties has sales or assets in Ukraine exceeding €1 million. And it makes no difference whether such subsidiary in Ukraine acts at the same market in which the concentration takes place.

As a result, many multinational companies do apply for a permit in Ukraine for nearly all of their transactions worldwide; however, some companies simply choose to ignore the requirement.



Therefore, one of the first reforms that the AMC plans to implement is to increase the financial threshold requirements. In addition, the AMC plans to implement fast-track procedure for merger clearance, shortening the period for review from 45 to 25 calendar days. At present, parties to a transaction need to obtain the permit for concentration from Ukrainian authorities before completing the transaction (there is no postnotification procedure, except for public biddings). Also, the authorities are reluctant to accept carveout agreements. This sometimes means a delay in the closing, and failure to comply may entail fines up to five percent of global turnover of all the parties involved. Therefore, introduction of a fast-track procedure would be welcomed by the market players.

ONE EURO OR A MILLION? **CALCULATING FINES**

Another coming amendment relates to calculation of fines for competition law violations. At the moment, the law provides only maximum amount of fines which may be imposed for those breaching the law. For instance, failure to provide information upon the Committee's request could entail a fine of up to one percent of the prior year's turnover; concentration without the necessary permit could entail a fine of up to five percent of the

prior year's turnover; anticompetitive concerned actions would result in a fine up to 10 percent of the prior year's turnover of all participants to such actions. Add to that the lack of guidelines or clear policy on how the exact amount of fines is calculated. In the past, cases arose in which one company could be fined €1,000, while another company could be fined €100,000 or more for a similar violation under similar circumstances. This disparity, and selectivity, has led to accusations of government corruption. The proposed new guidelines, which would include a list of mitigating and aggravating circumstances along with clear principles and rules for calculating fines, are drafted now and are expected to be adopted.

GOING PUBLIC: PUBLICATION OF THE ANTIMONOPOLY COMMITTEE'S DECISIONS

Last but not least is the amendment which concerns publication of Committee decisions. Under current rules, decisions that the Committee has made are not typically made public – for only a limited number of cases has the outcome been publicly announced. The new rule aims to provide for publication of all decisions, excluding confidential information and commercially sensitive data. That rule has been developed and is expected to be close to approval.





Galyna Zagorodniuk Legal Director T +380 44 490 9561 galyna.zagorodniuk@dlapiper.com



CANADA

CANADA ADOPTS SIGNIFICANT CHANGES TO FOREIGN INVESTMENT REVIEW FRAMEWORK

By Catherine Pawluch and Kevin Wright

On 24 April 2015, the Canadian government adopted regulations that significantly affect the foreign investment review framework. With the exception of cultural businesses and investments by foreign state-owned enterprises (SOE), the changes affect foreign investments in all sectors of the economy. Notably, the pre-merger review and national security provisions in the Investment Canada Act (ICA) (described below) apply in addition to the merger control provisions set out in the Competition Act, which should also be reviewed in advance of a merger transaction affecting Canada.

The new regulations implement the long anticipated changes to the existing thresholds that trigger a net benefit review under the ICA. For investments by World Trade Organization (WTO) private-sector investors, the basis of the net benefit review threshold has changed from the "book value" of the target Canadian business's assets to the "enterprise value." The new threshold amount is CA\$600 million. This is expected to result in the review of fewer foreign investment proposals to determine whether they are likely to be of net benefit to Canada.

However, foreign SOE will continue to be subject to the existing standard for the net benefit review threshold, specifically, the book value of the target Canadian business's assets. This is in line with the Canadian government's policy on SOE and will allow greater scrutiny of investments made by foreign SOE in sectors of the Canadian economy. Investors from

non-WTO member countries and foreign investments in Canadian "cultural businesses" will also continue to be subject to the existing net benefit review threshold.

The new regulations also increase significantly the information required from foreign investors, even where there is no net benefit review, in order to provide Canadian security and intelligence agencies with more information about investors and their investments. This change aligns with the Canadian government's authority to conduct a national security review of a foreign investment, where it determines whether an investment could be injurious to national security. Increasingly, such national security reviews are being undertaken. The new regulations have increased the timeline for completing such reviews from 130 days to 200 days.

This bulletin provides an overview of the foreign investment landscape in Canada, and the key aspects of the new regulations. All amounts are stated in Canadian dollars.

OVERVIEW OF FOREIGN INVESTMENT IN CANADA

The acquisition of control of a Canadian business or the establishment of a new business by a foreign investor in Canada requires compliance with the ICA and its regulations. In some instances, the ICA deems the

acquisition of a minority interest in a Canadian business by a non-Canadian investor to be an acquisition of control. Foreign investment proposals require an analysis to determine whether the foreign investor requires a pre-closing approval from the Canadian government.

Monetary thresholds prescribed under the ICA are used to determine whether an investment proposal by a non-Canadian will be reviewed by the Canadian government to assess whether it is likely to be of "net benefit to Canada." All other acquisitions of control of a Canadian business and the establishment of new businesses in Canada by a foreign investor require that a notification be given to the Canadian government within thirty days of closing or, in the case of a new business, its establishment.

In addition to the net benefit review process, the ICA contains national security provisions, which permit the Canadian government to review investments that could be injurious to national security. The federal Cabinet may impose any measures that it considers advisable to protect national security. The ICA does not define "national security", which injects significant discretion and corresponding uncertainty into this aspect of the investment review process. Foreign investments constituting the acquisition of a minority holding in a Canadian business or resulting in the establishment of a new Canadian business, or even a foreign entity carrying



on all or part of its operations in Canada are all subject to the national security provisions. There are no monetary thresholds for national security reviews, which may be initiated after a transaction has been completed or an investment has been implemented.

NEW NET BENEFIT REVIEW THRESHOLD

Monetary thresholds prescribed under the ICA are used to determine whether investment proposals by foreign investors will be reviewed by the Canadian government to assess whether they are likely to be of net benefit to Canada. Under the predecessor law, a direct acquisition of control of a Canadian business (either a share acquisition or an asset acquisition) by a non-Canadian WTO investor was generally subject to a net benefit review if the "book value" of the assets of the Canadian business exceeded CA\$369 million.

As of 24 April 2015, the threshold determination is based on the "enterprise value" of the Canadian business. A net benefit review will generally be required if the enterprise value of the target Canadian business's assets is CA\$600 million or more. The threshold will be increased to CA\$800 million in two years, to CA\$1 billion two years later and thereafter, indexed annually to reflect changes in Canada's gross domestic product (GDP).

The regulations set out a detailed formula to determine "enterprise value." Generally, the calculation will be as follows:

- For publicly traded companies, the enterprise value of the assets of the Canadian business is equal to the market capitalization of the entity plus its liabilities (other than operating liabilities) minus its cash and cash equivalents.
- For private companies, the enterprise value of the assets of the Canadian business is equal to the total acquisition value, plus its liabilities (other than its operating liabilities) minus its cash and cash equivalents.
- For an asset acquisition, the enterprise value of the assets of the Canadian business is equal to the total acquisition value, plus its liabilities (other than its operating liabilities) minus its cash and cash equivalents.

The enterprise value is determined based on the date of filing. The formula for calculating the enterprise value and in turn, determining whether a pre-closing approval from the Minister of Industry is required, is complex and should be reviewed to properly assess the foreign investor's obligations under the ICA.

STATE-OWNED ENTERPRISES

The Canadian government continues to review investments by foreign SOE under the rules that existed before 24 April 2015. Under the ICA, an SOE is broadly defined and includes not only entities that are owned by a foreign state, but also entities that are directly or indirectly owned, controlled or influenced by a foreign government. Foreign SOE investment proposals are assessed using more extensive factors to determine whether they are likely to be of net benefit to Canada, including whether the target Canadian business would be operated on a commercial basis.

The CA\$369 million threshold, based on the book value of the Canadian business's assets, will continue to apply to investments by SOE. The asset value threshold will continue to be indexed annually to reflect changes in Canada's nominal GDP.

OTHER INVESTMENTS EXCLUDED FROM NEW "ENTERPRISE VALUE" RULES

The existing book value threshold also continues to apply:

(i) in the case of non-WTO investors, unless the Canadian business is controlled by a WTO investor immediately prior to the implementation of the investment or



(ii) where the foreign investment is in a "cultural business", a term that is broadly defined in the ICA. In these cases, the thresholds for review remain at CA\$5 million and CA\$50 million in book value for direct and indirect investments, respectively.

NEW DISCLOSURE REQUIREMENTS

Where the thresholds are not exceeded and an investment proposal is not subject to a net benefit review, the non-Canadian investor must nevertheless notify the Canadian government of the investment and file a notification in the prescribed form. Such notification must be given within thirty days of closing. Under the new regulations, foreign investors are required to provide significantly more information when completing the notification form, even where there is no net benefit review.

Among the new informational requirements, foreign investors will have to identify:

- 1. the names of board members
- 2. the investor's five highest paid officers
- 3. any person or entity that own 10 percent of the investor's equity or voting interests
- 4. whether the investor is owned, controlled or influenced, directly or indirectly, by a foreign government and
- 5. sources of funding for the investment.

Additionally, investors must furnish a copy of the purchase and sale agreement or if not available, a description of the principal terms and conditions, including the estimated total purchase price for the Canadian business. The government will use this information to determine whether the foreign investment should be reviewed under the national security provisions of the ICA.

Significantly more informational requirements have also been added to the application for review form, which applies when the foreign investment proposal is subject to the net benefit review assessment. This information will be used to determine whether the government will also initiate a national security review of the proposed foreign investment.

ESTABLISHMENT OF NEW CANADIAN BUSINESS

It should be noted that where a foreign investor establishes a new Canadian business, there is a requirement to file a notification form with the Canadian government. The new regulations require significantly more disclosure of information about investors and their investments. Such foreign investments are also subject to the national security provisions.





Catherine Pawluch Partner T +1 416 369 5272 catherine.pawluch@dlapiper.com





Kevin Wright Partner T +I 604 643 646I kevin.wright@dlapiper.com

"DON'T LEAVE HOME WITHOUT IT"? UNITED STATES V. AMERICAN EXPRESS

By Steven Levitsky

The US Court of Appeals for the Second Circuit this summer refused to stay an order, pending appeal, that required American Express to halt the so-called "anti-steering" requirements in its merchant contracts.

This is the most recent development in the five-year-old litigation brought by the US Department of Justice (DoJ) against American Express. Like several other antitrust cases this year, it raises serious issues about whether the antitrust laws are still interpreted to promote aggressive competition on the merits. In this disturbing decision, for example, the court found that a competitor with 26 percent of the market, possessed "market power should be."

Summed up quickly, American Express' contractual relationships prohibited its merchants from "steering" customers to other cards, or encouraging them to use alternative payment methods. These prohibitions covered other forms of payment that the merchant might prefer or that consumers might prefer. Examples of these prohibitions include discounts for the use of another card, displaying slogans like "We Prefer Discover" or asking customers to "please keep in mind that credit and charge expenses are some of our highest costs."

The DoJ had originally challenged the marketing tactics of all three major credit card companies. Visa and Mastercard settled. Amex insisted on going to trial. The trial lasted

almost two months during the summer of 2014. Then in February 2015, the judge issued a 150-page opinion. He applied a Rule of Reason analysis and found that the American Express merchant rules were anti-competitive.

The critical part of the court's decision is the following:

"The court concludes that American Express does possess antitrust market power in the GPCC card network services market sufficient to cause an adverse effect on competition. Specifically, the court finds that Defendants enjoy significant market share in a highly concentrated market with high barriers to entry, and are able to exercise uncommon leverage over their merchantconsumers due to the amplifying effect of cardholder insistence and derived demand."

But this statement needs to be analysed under the light of other important industry facts, which were acknowledged in the court's decision.

First, American Express is by no means the largest installed base of major credit cards. It has 26.4 percent of the general purpose credit card market, slightly more than MasterCard at 23.3 percent, but just slightly over half of Visa's market share, at 45 percent. And the market the court used ignored the impact of debit cards, despite what the court acknowledged as "the dramatic growth in customers' use of debit cards in the last decade."

Second, for many years, American Express was excluded from being able to form relationships with card-issuing banks, because Visa and Mastercard had imposed exclusionary rules on those institutions. Even today, Amex has a network of only nine banks that issue cards, and these make up only about one percent of Amex's annual charge volumes.

Third, Visa had run what the court called a "remarkably effective" anti-Amex campaign, hammering home slogans like "It's Everywhere You Want To Be" and "We Prefer Visa." The result of this campaign was a 25-45 percent shift in card volume from American Express to Visa. In 1995, Amex had only 20 percent of the general purpose credit card market. In 19 years, as of the trial last summer. Amex had succeeded in gaining only 6.4 percent of the market, hardly an imposing expression of economic power. Finally, the court's decision recognized that at least part of the "power" attributed to Amex came not from its merchant restrictions, but rather what it called "cardholder insistence." This essentially means that Amex cardholders themselves "don't leave home without it," and also may not buy at a store where it is disfavoured.

However, the court concluded that Amex "does possess antitrust market power in the GPCC card network services market sufficient to cause an adverse effect on competition."



In theory, the outcome could result in a merchant's offering two-tier pricing, with the cost of using an American Express card carrying a higher charge to the consumer than another form of payment. However, many industry observers believe that major merchants would never alienate their customers with this tactic.

The decision also seems to ignore the fact that a merchant, or at least a substantial merchant, can successfully bargain against, or discipline, American Express. This is not a hypothetical situation. As the financial services have so dramatically reported recently, JetBlue recently terminated its Amex co-branded card relationship in favour of other card issuers. In the same period, Costco not only terminated its cobranded relationship, but will no longer even accept Amex cards in its stores. Costco reportedly represents about eight percent of Amex's overall billed business. The court's decision reviews earlier attempts by

merchants to discontinue accepting Amex cards, and concludes that "even the nation's largest merchants are not immune to the effects of cardholder insistence." But that conclusion seems to ignore the "natural experiments" carried out successfully by Costco and JetBlue.

On 16 June 2015, the Second Circuit refused to stay enforcement of the judge's order, but did promise an expedited appeal.

In the 150 pages of the decision, there are, as expected, many complex issues, including an analysis of so-called two-sided markets. Notwithstanding that, this decision is clearly a problematic development in antitrust law. It both permits injunctive relief, based on non-price vertical restraints, against a company that is not the dominant player, and it concludes that a competitor – with only about a quarter of the market – possesses market power.





Steven Levitsky Of Counsel T +1 212 335 4723 steven.levitsky@dlapiper.com



AUSTRALIA

AGREEMENTS ON PENALTIES: AN END TO SETTLING ENFORCEMENT PROCEEDINGS WITH AUSTRALIAN REGULATORS?

By Rani John and Jennifer Griffin

In a controversial decision overturning two decades of accepted practice, the Full Federal Court of Australia in Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCAFC 59 (CFMEU case) has held that it is impermissible for regulators to make submissions to the court about the amount of an appropriate pecuniary penalty in civil penalty proceedings (whether on an agreed basis or otherwise).

Until this decision, it was common practice for parties to agree on penalties as a way of settling civil investigations commenced by Australian regulators, including those conducted by the Australian Competition and Consumer Commission (ACCC). Proceedings were then commenced requesting the award of penalties by the court. In those proceedings, the parties would make submissions to the court on the agreed penalty amount or recommended range. The court frequently gave significant weight to these submissions, and, almost invariably, adopted the agreed penalty amount sought by the parties at least where the quantum of the penalty fell within the applicable range for the contravention in question (as reflected in the case law and as against the maximum statutory penalty), and where the court was satisfied that the statement of agreed facts presented to the court was complete and accurate.

The decision in the CFMEU case has, at least for now, significantly curtailed the ability of multiple Australian regulators to negotiate agreed penalty amounts with respondent parties in advance of the commencement of proceedings. However, the Full Federal Court's decision will not be the last word on the issue. Reflecting the significant impact of the CFMEU case on regulatory enforcement activity, the Commonwealth of Australia was recently granted leave to appeal the Full Federal Court's decision to the High Court of Australia, Australia's highest court, on an expedited basis. We expect the High Court will hear the case later in 2015.

In the meantime, all current or contemplated negotiations with the ACCC and other Australian regulators in civil penalty cases remain in limbo. While it is still possible to reach agreement about factual matters, and make submissions about comparable cases and the proper approach to determining a penalty, the practical consequence of the CFMEU case, pending any different decision by the High Court or legislative reform, is that parties have little or no certainty about the ultimate outcome.

BACKGROUND TO THE CFMEU CASE

The Fair Work Building Industry Inspectorate (FWBII) had alleged that two unions had contravened the Building and Construction Industry Improvement

Act 2005 (Cth), and sought pecuniary penalties against them. The unions had agreed to pay penalties in agreed amounts to the Director of the FWBII, and the Director had commenced proceedings in the Federal Court requesting the court to award penalties against the unions in those amounts, subject to the court's discretion.

At pre-trial stage, the case was transferred to the Full Federal Court and the Commonwealth of Australia was granted leave to intervene and make submissions on the practice of pre-agreeing and making submissions on the penalty or the range within which a penalty should fall. This was as a result of the court's concerns about the application of the decision in Barbaro v R (2014) 253 CLR 58. In Barbaro, the High Court had held that in criminal sentencing proceedings, submissions from the prosecution on the sentencing result or the range in which a sentence should fall were inadmissible and should not be received by a court. That decision was based on concerns that to do otherwise impinged on the court's role in determining facts and weighing those facts in exercising its discretion to impose a sentence. A number of single judge decisions subsequent to Barbaro in the Federal Court, and in some state supreme courts had, however, proceeded on the basis that the principles in Barbaro did not apply in civil penalty cases.



EVIDENCE FROM COMMONWEALTH REGULATORS

A number of Commonwealth regulators – the ACCC, the Australian Securities and Investments Commission, the Australian Taxation Office and the Fair Work Ombudsman (together, the regulators) – provided evidence on the practice of agreeing penalties prior to proceedings. The ACCC emphasised that the practice was integral to its capacity to conduct effective negotiations and resolve enforcement proceedings, particularly to avoid the cost of a contested hearing. It gave evidence that approximately 70 percent of civil penalty cases it had brought and which had been decided since January 2010 had involved agreed penalties. The Fair Work Ombudsman had similar statistics; each of ASIC and the ATO had smaller, but still significant, percentages, of civil penalty cases which had taken that path.

All the regulators identified multiple negative consequences that would likely flow from applying Barbaro. Those consequences included an increase in contested hearings in relation to penalty, liability or both, resulting in higher costs for both parties, and greater delays in resolving matters. The regulators considered this drain on regulator resources could ultimately result in fewer investigations being run, and a reduction in specific and general deterrence as a consequence. Further, it could mean parties had less incentive to cooperate with the regulators through the course of any investigation.

THE FULL FEDERAL COURT'S DECISION

The Full Court, while accepting that applying *Barbaro* would cause some inconvenience and increased expense to regulators and respondents in cases where agreed penalties had already been identified, did not accept that this was a significant or persuasive factor. It stated that it did "not expect that such additional cost will be significant", although the foundation for this expectation was not identified. It was generally dismissive of the regulators' evidence and the Commonwealth's arguments, and held that Barbaro applied to civil penalty proceedings, for the following reasons:

- The sentencing process in criminal proceedings, and the imposition of civil pecuniary penalties are very similar in nature: both involved punishment by the state and both required an assessment of a wide range of considerations, using the same "instinctive synthesis" as sentencing in criminal proceedings.
- The discretion to decide penalties, both civil and criminal, was one of the coercive powers of the state to punish or sanction wrongdoing which should be unfettered by submissions and agreements as to the extent of the punishment. While parties were free to put forward agreed facts, emphasise relevant evidence from comparable cases and make submissions on the general approach on fixing the penalty, the court had the ultimate responsibility to determine the appropriate penalty.

The responsibility of deciding punishment is reserved for the court. Such responsibility must be seen to be entirely dispassionate and uphold faith in the judicial process. The regulator's involvement in the investigation and negotiations renders it unlikely to hold a dispassionate view of all the circumstances. Further, their submissions as to agreed penalties demonstrated no established legal method in forming an opinion on the appropriate penalty to present to the court. This increased the risk of such opinions compromising the sentencing process or creating a negative public perception of the process.

SPECIAL LEAVE TO THE HIGH COURT

The Commonwealth sought special leave to appeal to the High Court of Australia from the Full Federal Court's decision, on the issue of whether the decision in Barbaro should apply to civil pecuniary penalties under the Act, so as to constrain the making or consideration of submissions as to the amount of the penalty. The Commonwealth clarified that it was not seeking a finding that a court was bound to accept a proposed or agreed penalty, but rather whether it was able to receive submissions on agreed penalty amounts.



The Commonwealth's arguments on the special leave application emphasised again the differences in nature between criminal sentencing and pecuniary penalty proceedings. It also pointed to:

- the civil regulatory regime created under the Act, which operated against a backdrop of civil rather than criminal practices and procedures
- substantial differences in the nature of the submissions in Barbaro (which were about the "available range" of sentences that could be imposed, not about an appropriate and agreed penalty as was the case here) and
- the broad consequences of the Full Federal Court's decision, including the disruption of decades of previously settled practice and the likely impact on the number of contested civil penalty proceedings and on regulators' resources.

The High Court granted leave to appeal on an expedited basis.

WHERE DOES THIS LEAVE NEGOTIATIONS WITH AUSTRALIAN REGULATORS IN THE **MEANTIME?**

Pending the High Court's decision, all current and contemplated negotiations with Australian regulators to resolve civil penalty proceedings are affected by the considerations that the regulators identified in their evidence in the CFMEU case, and others:

- both regulators and respondents will face increased costs and uncertainty of outcome, relative to the position that existed prior to the Full Federal Court's decision
- there will likely be a chilling effect on negotiated settlements
- respondents may more frequently elect to contest issues of penalty or even liability
- in turn, regulators may be less willing to commence proceedings with lower prospects of success, or may choose to litigate only those cases involving particularly serious conduct and
- even where parties do negotiate on the content of agreed statements of facts (which are still permitted), the uncertainty of outcome means that even greater focus will be given to the content of those statements as a remaining avenue for informing court determinations as to penalty.





Rani John Partner, Sydney T +61 2 9286 8220 rani.john@dlapiper.com

DLA PIPER RAPID RESPONSE APP

The DLA Piper Global Rapid Response App provides our clients with legal crisis assistance at the touch of a button and compliments the 24/7 global hotline to assist them in a legal crisis.

Crisis management lawyers and communications professionals are on call to answer any questions and help clients deal with any legal crisis they may face. Whether it is a dawn raid, an unannounced regulatory visit or interviews under caution, the app provides a useful first port of call.

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

The App is available for free to download from the Apple Store, BlackBerry World and Google Play.



RAPID RESPONSE HOTLINE

Experiencing a crisis? Call our Rapid Response hotline any time, 24/7 to gain immediate access to our crisis management advisers.

Europe

Austria +0800 298 663
Belgium +0800 74721
Czech Republic +441 90 800 27 35
Denmark^ +80 882 525
France +08 0 090 2699
Georgia +441 90 800 27 41
Germany +0800 181 4277
Italy +800 972 933
Netherlands +08 0 002 20291
Norway* +800 165 555
Poland +441 90 800 27 40
Romania +441 90 800 27 38

Russia:

Moscow +441 90 800 27 42 St Petersburg +441 90 800 27 43 Slovak Republic +441 90 800 27 37 Spain +900 987132 Ukraine +441 90 800 27 44 United Kingdom +0800 917 3999

Africa and the Middle East

South Africa* +08 0 098 0623 United Arab Emirates: Abu Dhabi +19 0 800 2754 Dubai +19 0 800 2756

Australia +0800 298 663

Asia Pacific

China:
Beijing +108 00 744 1248
Shanghai +40 0 120 2125
Hong Kong +800 862 565
Japan +44 1908 002724
New Zealand* +44 1908 002713
Singapore +800 4411 311
Thailand +001 800 442136

Americas

USA +1866 709 3735

For further information on Rapid Response visit http://www.dlapiperrapidresponse.com/

^{*} DLA Piper Group Firm which is an alliance of independent law firms with exclusive agreements with DLA Piper. All the members of the alliance work together to provide a comprehensive and coordinated legal service to clients, locally and globally.

[^] DLA Piper Focus Firm which is an alliance of independent law firms which we have worked with on a long-term basis and are committed to developing a structured relationship. They are instructed as our firm of choice in this jurisdiction wherever possible.

KEY CONTACTS

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

Our global team works closely across jurisdictions to provide clients with local knowledge, international insight and consistent quality across multiple jurisdictions. Our global platform also means that we work closely with DLA Piper's international trade and government relations practices, giving us the ability to advise on media relations and the workings of governments and policy makers, and allowing us to provide a broader range of solutions to the problems faced by businesses.

Find out more about our work by contacting any of these members of the team:

EDITOR

Bertold Bar-Bouyssiere

Partner

T +32 2 500 1535

bbb@dlapiper.com

Michael Marelus

T +32 2 500 1676

michael.marelus@dlapiper.com

If you have any questions regarding this newsletter, please contact:

Bertold Bar-Bouyssiere

T +32 2 500 1535

bbb@dlapiper.com

Leon Korsten

T +31 20 541 9873

leon.korsten@dlpaiper.com

EUROPE

Austria

Claudine Vartian

T +43 | 53| 78 |4|0

claudine.vartian@dlapiper.com

Belgium

Bertold Bar-Bouyssiere

T +32 2 500 1535

bbb@dlapiper.com

Czech Republic

Jan Rataj

T +420 222 817 800

jan.rataj@dlapiper.com

France

Marie Hindre-Gueguen

T +33 | 40 | 15 24 | 10

marie.hindre-gueguen@dlapiper.com

Georgia

Otar Kipshidze

T +995 32 250 93 00

otar.kipshidze@dlapiper.com

Germany

Jan Dreyer

T +49 221 277 277 330

jan.dreyer@dlapiper.com

Michael Holzhauzer

T +49 69 271 33 235

michael.holzhauser@dlapiper.com

Hungary

Istvan Szatmary

T +36 | 510 | 1145

istvan.szatmary@dlapiper.com

Italy

Francesca Sutti

T +39 02 80 618 520

francesca.sutti@dlapiper.com



Alessandro Boso Caretta

T +39 06 68 880 502 alessandro.bosocaretta@dlapiper.com

Netherlands

Leon Korsten

T +31 20 541 9873 leon.korsten@dlpaiper.com

Norway

Kjetil Johansen

T +47 2413 1611 kjetil.johansen@dlapiper.com

Poland

Jacek Gizinski

T +48 22 540 74 04 jacek.gizinski@dlapiper.com

Romania

Livia Zamfiropol

T +40 372 155 809

livia.zamfiropol@dlapiper.com

Russia

Elena Kurchuk

T +7 495 221 4174 elena.kurchuk@dlapiper.com

Slovak Republic

Michaela Stessl

T +421 2 59202 142 michaela.stessl@dlapiper.com

Spain

Juan Jimenez-Laiglesia

T +34 91 788 7378

juan.jimenez-laiglesia@dlapiper.com

Jose Maria Jimenez-Laiglesia

T +34 91 788 7334

josemaria.jimenez-laiglesia@dlapiper.com

Ukraine

Margarita Karpenko

T +380 44 490 9565

margarita. karpenko@dlapiper.com

United Kingdom

Kate Vernon

T +44 20 7796 6710

kate.vernon@dlapiper.com

Alexandra Kamerling

T +44 20 7796 6490

alexandra.kamerling@dlapiper.com

ASIA PACIFIC

Austrialia

Simon Uthmeyer

T +61 392 74 5470

simon.uthmeyer@dlapiper.com

Japan

Tomoko Saito

T +81 3 4550 2823

tomoko.saito@dlapiper.com

Thailand

Chanvitaya Suvarnapunya

T +662 686 8552

chanvitaya.suvarnapunya@dlapiper.com

AMERICAS

Brazil

Andre Marques Gilberto

T +55 | 1 | 3077 3516

andre.gilberto@dlapiper.com

Mexico

Carlos Valencia

T +52 55 5002 8181 carlos.valencia@dlapiper.com

Jorge A. Benejam

T +52 55 5261 1892

F +52 55 1084 2731

jorge.benejam@dlapiper.com

United States

David Bamberger

T +1 202 799 4500 david.bamberger@dlapiper.com

Lesli Esposito

T +1 215 656 2432

lesli.esposito@dlapiper.com

Canada

Catherine Pawluch

T +1 416 369 5272

catherine.pawluch@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com

Copyright © 2015 DLA Piper. All rights reserved. | SEP15 | 2985837