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TalkingPoint

THE EVOLUTION OF COMPETITION/ ANTITRUST LAW

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FW: What do you consider to be the most important developments to have taken place in the antitrust/ competition law arena over the past 12 months or so?

Garrod: Antitrust is a highly dynamic legal area. Over the past year the EU Council's final adoption of the EU Damages Directive and the publication of the Recommendation on Collective Redress have been important developments, as have the two antitrust damages cases which managed to make it to the High Court last summer, only to settle at the last minute. The reform of the EU Merger Regulation has been another key development, including the further streamlining of the simplified review procedure and the proposal to expand the EU merger regulation to cover non-controlling minority acquisitions. Within the UK, last April saw the Competition & Markets Authority (CMA) officially up and running. Furthermore, a number of changes to existing UK competition law came into effect, such as the removal of the dishonesty requirement for prosecuting violations of the cartel offence.

Zurkinden: From our point of view, there were three developments worth reporting. Firstly, the Swiss Parliament, in a wise decision, refused to enter into discussions on an amendment of the Swiss Law on Cartels. The proposed amendment would introduced legal concepts into the Law on Cartels resulting in significant uncertainty for companies. Secondly, a cooperation agreement between the EU and Switzerland allowing the country's competition authorities to exchange confidential information in parallel proceedings entered into force on 1 December 2014. Thirdly, the Federal Administrative Court issued two contradictory judgments.

Lecchi: 2014 was an eventful year. The UK has seen an overhaul to its competition regime with a new competition law authority being set up: the Competition and Markets Authority. Financial markets have also come under new scrutiny both under a new market investigation and with the creation of the new Payment Systems Regulator. A wave of telecoms and cable mergers has led to greater consolidation in the communications sector, and developments in consumer protection law in the UK and EU aim to make it easier for individuals to seek redress for competition law breaches and increase the amounts defendants will be liable to pay under private actions in damages.

FW: In your opinion, what have been the most significant competition/antitrust cases in recent years? How have they impacted the enforcement landscape?

Zurkinden: Only recently, the Competition Commission closed its investigation into the credit card market. According to a settlement achieved with issuers and acquirers, the average Domestic Multilateral Interchange Fees (DMIF) for MasterCard and Visa shall decrease in two steps from 0.95 percent to 0.44 percent. Similarly to the European Commission, the Competition Commission determined the DMIF based on the Merchant Indifference Test. Meanwhile, as a legislative proposal is being worked on in the EU, Switzerland, for the time being, leaves it at a settlement which can be cancelled by either party at the earliest in 2019. Another major issue within Switzerland has seen two rather contradictory judgments rendered by the Federal Administrative Court in 2013 and 2014. By way of background information – in Swiss law, agreements are unlawful if they eliminate competition or if they significantly restrict competition and cannot be justified on efficiency grounds. Certain agreements are presumed to eliminate competition. The presumption is rebuttable. In a 2013 judgment, the Federal Administrative Court held that if a presumption is rebutted, such agreements – *ad majore ad minus* – significantly restrict competition, and concrete restrictive effects do not have to be analysed or proved. In a 2014 judgment, another panel of judges of the same court held that in Switzerland there is no rule according

to which certain types of agreements would significantly restrict competition. Both decisions are on appeal before the Federal Supreme Court and it remains to be seen which approach will eventually succeed.

Lecchi: Everyone is talking about the EU cases concerning *Intel* and *Groupement des Cartes Bancaires*. In the UK, a notable judgment, which could have wider repercussions, is *Skyscanner*, which is focused on the role of commitments in competition law. A debate on the way in which competition law is often enforced by commitments, and the effects that this enforcement practice has on deterrence is long overdue. The *Ryanair/Aer Lingus* merger control case was a very important case for the way in which a minority shareholding, which may not meet the requirements for 'control', could lead to competition concerns nonetheless. The current initiative by the EU to expand merger rules to cover minority shareholdings could be linked to the effects of this case.

Garrod: The EC's increasing use of the Article 9 commitment procedure has been an interesting and significant development. The EC has taken the Article 9 route in multiple cases, including cases involving Google, e-books, Microsoft and a number of energy cases. Whilst use of the commitments procedure can save scarce EC resources and enable speedier, tailored intervention, which can be particularly helpful in tech cases, one concern is the growing body of 'soft' Article 9 law rulings which companies and authorities are tending to treat as 'hard' laws applicable to all market participants, rather than just the parties to the commitment decision. Other significant competition cases include the financial institutions benchmark cases such as LIBOR, and the increasing involvement of the Financial Conduct Authority (FCA) in cases which may involve potential pricing or information-sharing infringements, even if the FCA chooses to pursue the cases under financial services legislation – FOREX, for example.

FW: 2014 has seen the emergence of new anti-cartel regimes around the world, such as the heightened powers given to regulators in France, Spain and Mexico. To what extent do you believe these initiatives will help to curb anti-competitive business practices?

Lecchi: In markets where demand is steady, and the product in question is homogeneous, the temptation to cartelise is high, but the focus on international anti-cartel enforcement is stronger than ever. Substantively the law is expanding as the type of conduct covered by cartels widens. For example, following reforms in 2014, both intentional and negligent cartel conduct is caught by rules in Mexico. Similarly, in addition to increased investigatory powers, in the UK the dishonesty requirement for cartel offences was removed, so companies will now need to self-regulate at a greater level of diligence than before. More dawn raids, as a result of increased investigatory powers, will also increase liability for businesses. However, the availability of leniency measures and settlement procedures in cartel cases dilutes the strong deterrent effect these new rules strive to achieve. Competition law regimes are striving to find a balance between the appropriate level of immunity and leniency to be granted to cartelists, and the deterrent effect of the rules. The focus on damages actions is the flipside of the increased reliance on immunity seekers for cartel investigations.

Garrod: Competition authorities around the world are continuously strengthening the way they pursue cartel offenders. In France, there was a reshuffle of its competition authority, the Autorité de la Concurrence. In Spain there was an amalgamation of the country's various sector-specific regulatory agencies into one unified market supervisor, the National Markets and Competition Commission. The changes in Mexico, however, were the most radical. The scope of cartel conduct was extended, the authorities were given more autonomy and power to issue regulations, and the sanctions for cartel conduct or

obstructing dawn raids were intensified. These initiatives are helpful, but they must be seen in context. Companies have become increasingly sophisticated as agencies have stepped up their anti-cartel enforcement. 'Smoking gun' documents evidencing 'old school' price-fixing or market-sharing are less common, as companies engage in increasingly complex forms of information exchange and other infringing behaviour either directly or via an intermediary. The EC's horizontal cooperation guidelines have attempted to clarify the boundaries of lawful information-sharing, but some provisions are becoming less relevant as technology evolves.

Zurkinden: We have seen a heightened sensibility among companies over the past 20 years. Switzerland introduced a new cartel law in 1995 and then in 2004 empowered the Competition Commission to impose sanctions. Ten years later, the cooperation agreement with the European Union intends to facilitate parallel investigations in international cases. Hence, we would submit that such reform initiatives have and will continue to improve compliance with competition laws.

FW: What advice do you have for companies on managing procedural costs in administrative cartel cases?

Garrod: Advisers to companies involved in multijurisdictional cartel investigations need to establish a coordinated and streamlined plan of action regarding the initial compliance audits, any dawn raids, document reviews, and the drafting and synchronisation of immunity or leniency applications. In the absence of efficient management, legal spend can quickly spiral out of control. Procedurally, companies are increasingly turning to the EC's settlement procedure, which enables a quicker result with a discount of up to 10 percent. As the new European Commissioner for Competition Margrethe Vestager said when announcing the first cartel settlement decision under the Juncker Commission , 'Envelopes': "Settlements are now a very well-established tool – alongside of course normal procedures. It will certainly help us to be more efficient and bust more cartels, hopefully many more cartels, in the future." Of course, the most effective way of reducing procedural costs in cartel cases is to implement a successful compliance program which will reduce the likelihood of being dawn raided or sent a Request for Information in the first place.

Lecchi: Businesses should try to prepare so as to avoid hitting the panic button at the beginning of the dawn raids process. Certain software tools available on the market can help companies prepare a data inventory or data map listing where data is stored, allowing for prompt retrieval in the event of raid. Even after a raid, a lot can be done by the company itself to search for problematic evidence on its servers. Training in a staged mock dawn raid scenario can also be given to staff, who would then know what to do during a raid, and, perhaps more crucially, what not to do, to demonstrate a proactive approach to compliance as recommended by the European Commission in its published guidance. When the process does require external legal assistance, in the event of a raid occurring, a fixed or negotiated fee could be implemented to avoid costs spiralling out of control, and a leniency application should be considered. Lack of proactive preparation almost inevitably results in increased costs for the companies in question, which will naturally tend to engage expensive lawyers without any time or margin for negotiating fees, and without the ability to assess the value that lawyers can realistically add to the process.

Zurkinden: First and foremost, addressees can only barely influence the size of the procedural costs, given that the competition authority feels responsible for the investigation. We have seen cases where procedural costs have tripled or quadrupled a sanction. Notwithstanding, companies subject to an investigation should, at the very

beginning of an investigation, thoroughly investigate their conduct and evaluate a leniency application in order to help reduce investigation efforts. In addition, companies should consider, at a relatively early stage, the possibility of a settlement, which normally reduces the duration of the investigation. Finally, as recent jurisprudence has shown, some procedural costs can be avoided if, for example, a company involved in an investigation waives a hearing.

FW: What issues and challenges are emerging in connection with applying leniency in antitrust/competition cases? What lessons do companies need to draw from recent developments?

Lecchi: Leniency and immunity applications are widely used. In the LIBOR cartel, for example, RBS benefitted from 100 percent immunity while JP Morgan received a 40 percent fine reduction. On the other hand, the deterrent function of competition law is marred by the availability of settlements, and too much reliance on immunity and leniency. As a counter to that, we are seeing much more focus on allowing damages actions against the cartelists not only by large plaintiffs but also as collective actions. Large law firms may also be reluctant to draft leniency applications which run counter to the interests of other large clients, as they will lead to conflict issues.

Zurkinden: According to a recent judgment of the Federal Administrative Court, a leniency application does not relieve the authorities from fully establishing that the concerned undertaking participated in the infringement of competition law, and does not represent an admission of having violated competition law. Similarly to the EU, Switzerland does consider leniency statements of rather relative evidentiary value. Nevertheless, this fact should not be understood to reduce a leniency applicant's duty to cooperate. Rather, leniency applicants, as mentioned before, are well advised to support their leniency statements with comprehensive and solid evidence. Hence, the requirements for leniency applicants may soar rather than decrease.

Garrod: Competition authorities around the world are increasingly reliant on their leniency regimes, and those of other agencies, in order to discover and take enforcement action against cartels. One major issue in the leniency sphere at present remains the extent to which claimants in damages cases before the national courts should be given access to documents which a leniency or immunity applicant has provided to an authority voluntarily. Accordingly, competition authorities must balance the benefit of such disclosure with the need to protect the leniency regime, without which many of these cartels would not be discovered in the first place. Indeed, a challenge facing the EC and the UK CMA will be how to stop the move towards facilitating cartels damages claims, through the EU Damages Directive and the UK Consumer Rights Act, from having a detrimental effect on leniency applications.

FW: Could you provide an insight into the concept of restriction of competition by object, and how European Courts are interpreting it?

Zurkinden: On 19 December 2013, the Swiss Federal Administrative Court handed down a judgement in which a vertical territories allocation agreement, including prohibition of passive sales, was assessed under the Swiss Cartels Act. With reference to EU law it concluded that such an agreement "by its nature" had to be qualified as a significant restriction of competition and such clauses could only be declared lawful if they could be justified on efficiency grounds. This conclusion represented a change from the 'single case' assessment of the significance of competition restrictions that was carried out hitherto by the Swiss competition authorities. In view of the recent *Cartes Bancaire* judgement of the European Court, and the fact that in a judgement dated 23 September 2014 the

Swiss Federal Administrative Court has itself somewhat revoked its former judgment of December 2013, it will be interesting to see which approach will succeed.

Lecchi: The concept of a 'by object' restriction means that certain conduct by its very nature is considered harmful to competition. In these cases, no full market analysis is required and simply finding out that certain types of misconduct have occurred can lead to fines. Market allocation or price fixing or other instances of cartelisation are considered to be restrictions 'by object'. In other cases, whether conduct can be considered anticompetitive 'by object' is less clear-cut. There are a number of cases where the concept has been analysed, most recently by the General Court in *Intel* and in the *Groupement des Cartes Bancaires* case. *Intel* sent shivers down the spine of commentators, appearing to advocate an increase of those cases where no full analysis is required by including certain types of rebates as 'by object' infringements. In the more recent *Groupement des Cartes Bancaires* judgment, however, the General Court clarified that conduct cannot have the object to restrict competition on the basis that it has the mere potential to restrict competition or that it is simply capable of restricting competition. This appears to advocate a more evidence-based approach. One possible interpretation is to consider that certain types of rebates will be considered restrictions by object, but that, more generally, a restriction will only be considered to be an infringement following an investigation.

FW: In a global business environment, the issue of the extraterritorial reach of competition/antitrust laws is becoming much more important. What are the benefits and drawbacks in the evolution of extraterritorial jurisdictions (ETJs)?

Lecchi: Mario Monti remarked in a speech to Fordham University in 2005, "How can we forbid poisoned cake at home, but allow it to be exported abroad?" Competition laws apply when there is an effect in the country in question, and so extraterritorial application of competition laws has been a reality in countries where the application of the competition rules has been more developed, such as the EU and the US. In today's global economy, where more and more countries are active in the implementation of competition rules, the scope for differing outcomes is rife. Take the example of the P3 Network shipping alliance. Denmark's AP Møller-Maersk A/S, Switzerland's Mediterranean Shipping Company and France's CMA CGM had proposed to coordinate the operation of around 250 ships between them on East-West shipping routes. In 2014, the alliance was blocked by MOFCOM, China's Ministry of Commerce, having previously been cleared by US and EU authorities.

Zurkinden: One should be careful with the term 'extraterritorial jurisdiction' in competition law. There must always be a link to the forum. In the EU, such a link is often made through the economic unity doctrine, the implementation doctrine or the effects doctrine. The Swiss Competition Commission only has jurisdiction if the infringement has repercussions in Switzerland. In this context let me share a thought on the economic unity doctrine. The use of this doctrine as an instrument to facilitate extraterritorial application of competition law may, in particular cases, also be problematic from an international law point of view. Generally, undertakings need to be careful and mindful that their conduct, which may be perfectly permitted in one country, may be considered anti-competitive in another country. As businesses tend to have processes on a corporate level, references must to be made to the strictest competition law, which in turn may affect competitiveness in a given market. To a certain extent, this may be avoided by implementing local processes, although such processes may make compliance monitoring more challenging in the future.

FW: Do private enforcement actions enhance or undermine the effectiveness of public enforcement actions? How should courts and competition regulators strike a balance between private and public enforcement?

Zurkinden: In Switzerland, private enforcement of competition law is not well developed. Part of the failed reform proposal of the Swiss Law on Cartels was to give end users, namely consumers, standing to claim cartel damages. Given the trends in neighbouring countries, and in particular in the EU, with the damages directive, there can be no doubt that private enforcement actions may complement public enforcement. However, legislators must be mindful not to jeopardise the leniency process and to give leniency applicants certain protection. In this respect, the approach chosen in the EU damages directive, with protecting corporate leniency statements from disclosure and, to certain extent, immunity recipients from joint liability, is an important aspect. From a Swiss perspective, we note that in particular in international cases, the publication of decisions can pose a real problem to parties when one decision contains factual information which goes beyond what is necessary to justify this decision, as this may inadvertently harm a party's legal position in a civil proceeding in another jurisdiction. We would suggest that in this context competition authorities should strive to achieve a certain 'parallelism'.

Garrod: Private damages actions enable claimants to seek injunctive relief or recover damages directly against defendants before the national courts. Such actions may be free-standing – standalone – or based upon a prior infringement action – follow-on. By contrast, a complainant cannot recover monetary damages against an infringer pursuant to a public EC or national competition authority investigation. Follow-on and 'hybrid' private actions can be a good example of the private and public antitrust enforcement regimes working in synch, at least as a matter of principle. From a timing perspective, however, it can take many years for claimants to receive payouts due to the need for appeals to have been exhausted in certain jurisdictions. Indeed, in jurisdictions such as the UK there has yet to be a final damages award as cases have tended to settle. Rather than undermining the effectiveness of public enforcement, private enforcement and national competition authority investigations enable the EC to focus its scarce resources on priority cases with a cross-border dimension.

Lecchi: The big attraction of coming clean is full immunity from public liability. With regard to civil liability, private actions in damages lead to a payment and therefore from a firms' perspective are not different from fines. Any uncertainty regarding risk of exposure will naturally undermine the incentive to sprint to the competition authority to confess wrongdoing. To that extent, decisions such as *Pfleiderer*, where the Court of Justice ruled that EU law does not prohibit third parties – potential damages claimants – from gaining access to documents obtained by a national competition authority through its leniency program, will inevitably have an impact on public enforcement action. On a systemic level a balance should be possible between strong public enforcement to deter and detect infringements, and a parallel need for an efficient accessible system of private enforcement for those who have been harmed to obtain compensation, especially in cartels where leniency, immunity and settlements can lead to reduced fines. ■