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CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

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October 31, 2018

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Overview

- No-Poaching and Wage-fixing Agreements under Antitrust Law and Recent Enforcement and Litigation Action
- Recent Cartel Enforcement Trends
- Premerger Notification under the Hart-Scott-Rodino Act (HSR Act) and Recent Developments and Best Practices
- Treatment of "Big Data" and Merger Control Laws
- National Security Investment Review and Advanced Technologies Based on New Rules in the EU, UK, France, and Germany

CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

NO-POACHING AND WAGE FIXING AGREEMENTS AND ANTITRUST LAW

No-Poaching and Wage Fixing Agreements and Antitrust Law

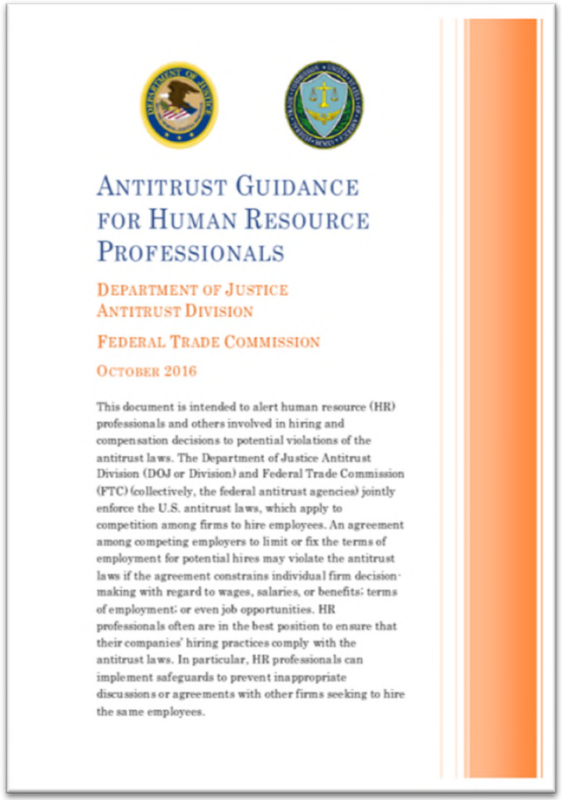
- DOJ and FTC Enforcement Focus
- Potential Legal Avenues
- International Dimensions and Issues
- Key Steps to Avoid Risk and Exposure

Private No-Poach Litigation Predated the HR Guidance

- *In re: High-Tech Employee Antitrust Litigation* (N.D. Cal. No. 11-CV-2509-LHK)
  - Filed May 2011
  - Class claims brought by current and former employees against: Adobe Systems, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar.
  - Allegations:
    - "Defendants' senior executives entered into an interconnected web of express agreements to eliminate competition among them for skilled labor. This conspiracy included: (1) agreements not to recruit each other's employees; (2) agreements to notify each other when making an offer to another's employee; and (3) agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer."
  - Settled in September 2015 for **$415 million**.

Antitrust Guidance for HR Professionals

- Jointly issued by US Department of Justice (DOJ) and Federal Trade Commission (FTC) in **Oct. 2016**
  - "[I]ntended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."
  - Addresses conduct that can result in criminal or civil liability
  - **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain "naked" wage-fixing and no-poaching agreements



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

Prohibited Agreements and DOJ Focus

- **"No Poach" Agreement**
  - Agreement "to refuse to solicit or hire that other company's employees"
  - Examples: Not soliciting or not hiring each other's employees
- **"Wage Fixing" Agreement**
  - Agreement "about employee salary or other terms of compensation, either at a specific level or within a range"
  - Examples: Setting salaries at a specific level, agreeing which benefits will or will not be offered
- **DOJ Focus**
  - "Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment"
    - DOJ Antitrust Division Update Spring 2018 (April 10, 2018)

DOJ Warning

- "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."
  - DOJ Division Update, Spring 2018 (April 10, 2018)

NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE "NO-POACH" AND WAGE-FIXING AGREEMENTS

The Antitrust Division protects labor markets and employees by actively pursuing investigations into so-called "no-poach" and wage-fixing agreements between employers. When companies agree not to hire or recruit one another's employees, they are agreeing not to compete for those employees' labor. The same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services. After all, workers, like consumers, are entitled to the benefits of a competitive market. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.

A no-poach agreement involves an agreement with another company not to compete for each other's employees, such as by not soliciting or hiring them. A wage-fixing agreement involves an agreement with another company regarding employees' salary or other terms of compensation, either at a specific level or within a range.

https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements

Potential Legal Avenues

- **Criminal Prosecution**
  - Against individuals, the company, or both
- **Civil Enforcement**
  - Against individuals, the company, or both
- **Private Litigation**
  - Subject to treble damages
  - Joint and several liability
  - Injunctive relief
  - Attorneys' fees and interest

- **Potential Plaintiffs**
  - Department of Justice
  - Federal Trade Commission
  - State Attorneys General
  - Private Parties
    - Class Actions
    - Employee Suits

Criminal Cases Under Investigation

Delrahim Says Criminal No-Poach Cases Are In The Works

By **Matthew Perlman**

Law360, New York (January 19, 2018, 5:18 PM EST) -- The U.S. Department of Justice's antitrust chief said Friday that the division has a handful of criminal cases in the works over agreements by companies not to hire each other's workers, signaling that a focus of the Obama administration is continuing.

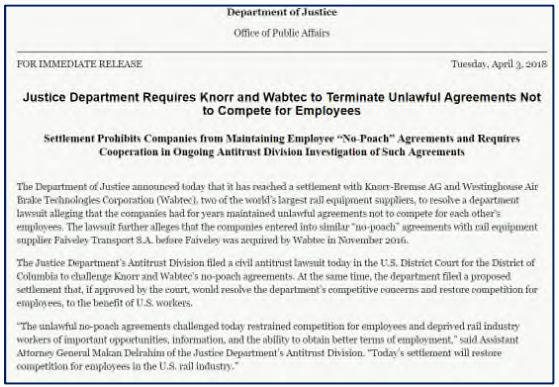
Assistant Attorney General Makan Delrahim laid out the division's recent work and current initiatives while speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University. He pointed to a **joint guidance issued** by the DOJ and Federal Trade Commission in 2016 — that warned employers that so-called no-poaching agreements would receive the same criminal treatment as traditional price-fixing — and said the agency remains active in the area.

"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim said at the conference.

https://www.law360.com/articles/1003788/print?section=competition

April DOJ Civil Enforcement Action

- *U.S. v. Knorr-Bremse et al.*: lawsuit against "two of the world's largest rail equipment suppliers"
  - German private company and US company, both with US subsidiaries
  - "No-poach" agreements with each other and a third rail equipment supplier based in France (acquired in 2016)
  - *Per se* unlawful horizontal market allocation agreements



Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Tuesday, April 3, 2018

Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees

Settlement Prohibits Companies from Maintaining Employee "No-Poach" Agreements and Requires Cooperation in Ongoing Antitrust Division Investigation of Such Agreements

The Department of Justice announced today that it has reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world's largest rail equipment suppliers, to resolve a department lawsuit alleging that the companies had for years maintained unlawful agreements not to compete for each other's employees. The lawsuit further alleges that the companies entered into similar "no-poach" agreements with rail equipment supplier Faiveley Transport S.A. before Faiveley was acquired by Wabtec in November 2016.

The Justice Department's Antitrust Division filed a civil antitrust lawsuit today in the U.S. District Court for the District of Columbia to challenge Knorr and Wabtec's no-poach agreements. At the same time, the department filed a proposed settlement that, if approved by the court, would resolve the department's competitive concerns and restore competition for employees, to the benefit of U.S. workers.

"The unlawful no-poach agreements challenged today restrained competition for employees and deprived rail industry workers of important opportunities, information, and the ability to obtain better terms of employment," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "Today's settlement will restore competition for employees in the U.S. rail industry."

- Consent Judgment Terms
  - Seven-year term
  - Appoint antitrust compliance officer
  - Annual compliance certification by CEO or CFO and General Counsel
  - DOJ may "inspect and copy" records and obtain interviews
  - Notice to all US employees, recruiting agencies, rail industry
  - Ongoing cooperation with DOJ

https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete

Narrow, Ancillary Restraint

V. CONDUCT NOT PROHIBITED

A. Nothing in Section IV shall prohibit a Defendant from attempting to enter into, entering into, maintaining, or enforcing a reasonable Agreement not to solicit, recruit, or hire employees that is ancillary to a legitimate business collaboration.

B. All Agreements not to solicit, recruit, or hire employees described in Paragraph V(A) that a Defendant enters into, renews, or affirmatively extends after the date of entry of this Final Judgment shall:

1. be in writing and signed by all parties thereto;
2. identify, with specificity, the Agreement to which it is ancillary;
3. be narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the Agreement;
4. identify with reasonable specificity the employees who are subject to the Agreement; and
5. contain a specific termination date or event.

FTC Wage Fixing Case

- FTC alleged that therapist staffing companies colluded to fix wages for the purpose of preventing individual therapists from seeking higher compensation at other therapist staffing companies, with the ultimate effect of increasing the companies' profits.
- Proposed consent order
  - Prohibits the therapist staffing company from agreeing to fix wages or sharing compensation information with other firms
  - Requires the submission of periodic compliance reports to the FTC
  - Authorizes the FTC to inspect the company premises and conduct interviews to determine compliance
- After public comment period, FTC will decide whether to finalize the proposed consent order.

Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area

Parties agreed to lower pay for home-care therapists

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FOR RELEASE

July 31, 2018

TAGS: Health Care | Health Professional Services | Bureau of Competition | Competition | Nonmerger | Unfair Methods of Competition

A Texas company that provides therapist staffing services to home health agencies, its owner, and the former owner of a competing staffing company have agreed to settle FTC charges that they agreed to reduce pay rates for therapists and invited other competitors to collude on the rates.

Your Therapy Source and other therapist staffing companies contract with or employ therapists, including physical, occupational, and speech therapists and therapist assistants, to treat patients of home health agencies. The complaint names Your Therapy Source, its owner Sheri Yarbray, and Neeraj Jindal, the previous owner of a competing therapist staffing company.

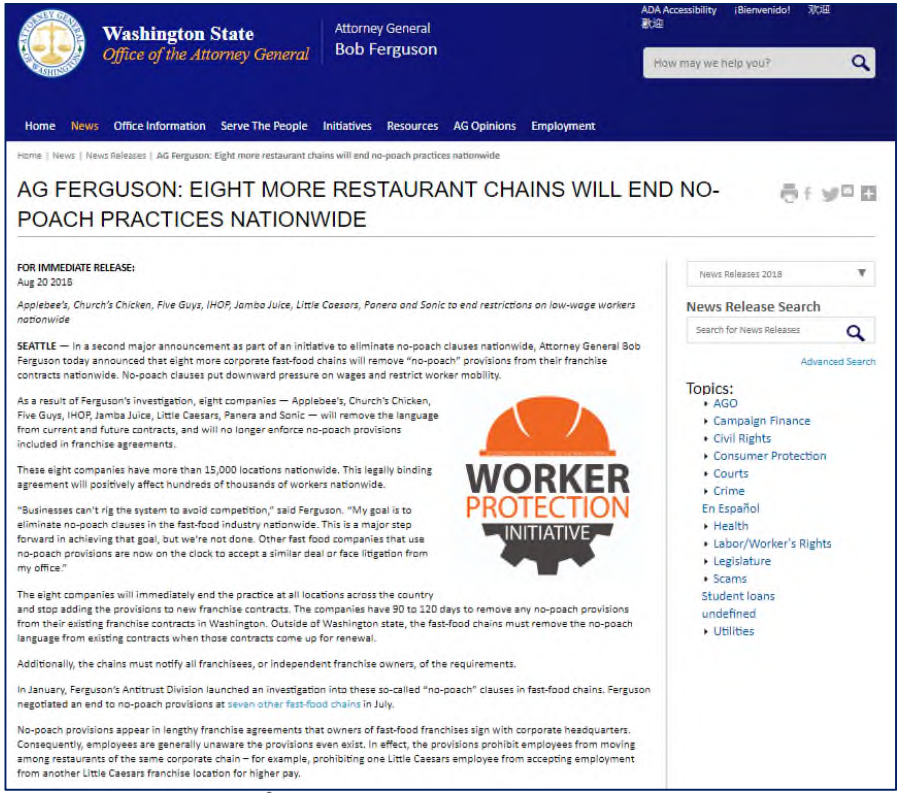
"Just as it is illegal for competitors to agree to fix prices on the products they sell in order to drive prices up, it is illegal for competitors to agree to fix wages or fees paid to workers in order to drive wages down," said Bruce Hoffman, Director of the Bureau of Competition. "All workers are entitled to competitive wages and the FTC will enforce the antitrust laws against any companies that agree not to compete for workers, or to attempt to drive down workers' wages. Fortunately, in cooperation with the Texas Attorney General's office, we were successful in stopping this conduct quite quickly. We will aggressively investigate any other instances in which companies engage in this type of behavior, and we will seek relief commensurate with the conduct, the harm to workers, and—where appropriate—any ill-gotten benefits received by the firms engaged in the illegal activities."

According to the complaint, the two owners agreed to lower their therapist pay rates to the same level and also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more. The complaint alleges that they entered into the agreement after learning that a home health agency planned to pay significantly lower rates to the therapist staffing companies for therapist services.

The complaint charges Your Therapy Source and the two owners with violating Section 5 of the Federal Trade Commission Act by unreasonably restraining competition to offer competitive pay rates to therapists; fixing or decreasing pay rates for therapists; and depriving therapists of the benefits of competition among therapist staffing companies.

https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they

Washington State Attorney General



Washington State
Office of the Attorney General
Attorney General
Bob Ferguson

ADA Accessibility ¡Bienvenido! 歡迎 歡迎

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Home | News | News Releases | AG Ferguson: Eight more restaurant chains will end no-poach practices nationwide

AG FERGUSON: EIGHT MORE RESTAURANT CHAINS WILL END NO-POACH PRACTICES NATIONWIDE

FOR IMMEDIATE RELEASE:
Aug 20 2018

Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera and Sonic to end restrictions on low-wage workers nationwide

SEATTLE — In a second major announcement as part of an initiative to eliminate no-poach clauses nationwide, Attorney General Bob Ferguson today announced that eight more corporate fast-food chains will remove "no-poach" provisions from their franchise contracts nationwide. No-poach clauses put downward pressure on wages and restrict worker mobility.

As a result of Ferguson's investigation, eight companies — Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera and Sonic — will remove the language from current and future contracts, and will no longer enforce no-poach provisions included in franchise agreements.

WORKER PROTECTION INITIATIVE

These eight companies have more than 15,000 locations nationwide. This legally binding agreement will positively affect hundreds of thousands of workers nationwide.

"Businesses can't rig the system to avoid competition," said Ferguson. "My goal is to eliminate no-poach clauses in the fast-food industry nationwide. This is a major step forward in achieving that goal, but we're not done. Other fast food companies that use no-poach provisions are now on the clock to accept a similar deal or face litigation from my office."

The eight companies will immediately end the practice at all locations across the country and stop adding the provisions to new franchise contracts. The companies have 90 to 120 days to remove any no-poach provisions from their existing franchise contracts in Washington. Outside of Washington state, the fast-food chains must remove the no-poach language from existing contracts when those contracts come up for renewal.

Additionally, the chains must notify all franchisees, or independent franchise owners, of the requirements.

In January, Ferguson's Antitrust Division launched an investigation into these so-called "no-poach" clauses in fast-food chains. Ferguson negotiated an end to no-poach provisions at seven other fast-food chains in July.

No-poach provisions appear in lengthy franchise agreements that owners of fast-food franchises sign with corporate headquarters. Consequently, employees are generally unaware the provisions even exist. In effect, the provisions prohibit employees from moving among restaurants of the same corporate chain – for example, prohibiting one Little Caesars employee from accepting employment from another Little Caesars franchise location for higher pay.

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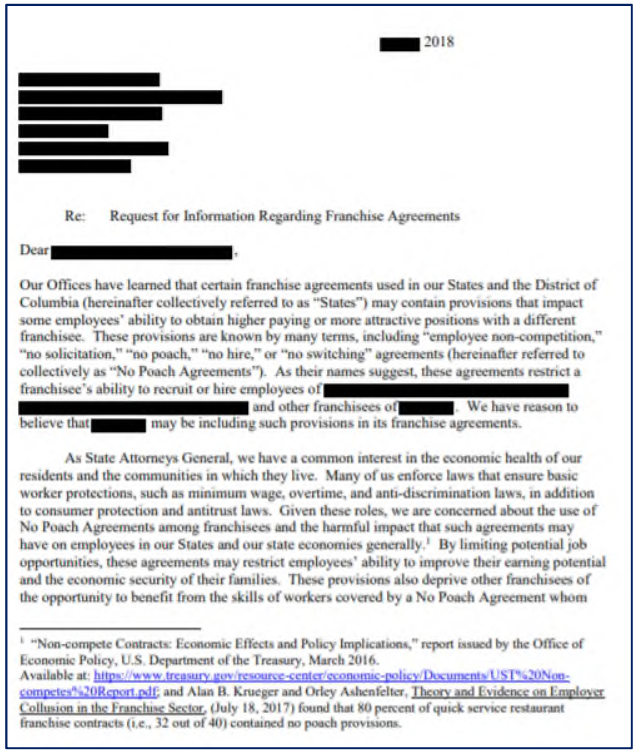
https://www.atg.wa.gov/news/news-releases/ag-ferguson-eight-more-restaurant-chains-will-end-no-poach-practices-nationwide

Massachusetts Multi-State Investigation



[redacted] 2018

[redacted]

Re: Request for Information Regarding Franchise Agreements

Dear [redacted],

Our Offices have learned that certain franchise agreements used in our States and the District of Columbia (hereinafter collectively referred to as "States") may contain provisions that impact some employees' ability to obtain higher paying or more attractive positions with a different franchisee. These provisions are known by many terms, including "employee non-competition," "no solicitation," "no poach," "no hire," or "no switching" agreements (hereinafter referred to collectively as "No Poach Agreements"). As their names suggest, these agreements restrict a franchisee's ability to recruit or hire employees of [redacted] and other franchisees of [redacted]. We have reason to believe that [redacted] may be including such provisions in its franchise agreements.

As State Attorneys General, we have a common interest in the economic health of our residents and the communities in which they live. Many of us enforce laws that ensure basic worker protections, such as minimum wage, overtime, and anti-discrimination laws, in addition to consumer protection and antitrust laws. Given these roles, we are concerned about the use of No Poach Agreements among franchisees and the harmful impact that such agreements may have on employees in our States and our state economies generally.[1] By limiting potential job opportunities, these agreements may restrict employees' ability to improve their earning potential and the economic security of their families. These provisions also deprive other franchisees of the opportunity to benefit from the skills of workers covered by a No Poach Agreement whom

[1] "Non-compete Contracts: Economic Effects and Policy Implications," report issued by the Office of Economic Policy, U.S. Department of the Treasury, March 2016. Available at: https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf; and Alan B. Krueger and Orley Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, (July 18, 2017) found that 80 percent of quick service restaurant franchise contracts (i.e., 32 out of 40) contained no poach provisions.

PRESS RELEASE

AG Healey Leads Multistate Investigation of Worker No-Poach Agreements at National Fast Food Franchises

Ten States and the District of Columbia Sign on to Letter Requesting Information Related to Provisions that Limit Recruitment and Hiring Practices of Franchisees

FOR IMMEDIATE RELEASE:
7/09/2018

Office of Attorney General Maura Healey
The Attorney General's Fair Labor Division

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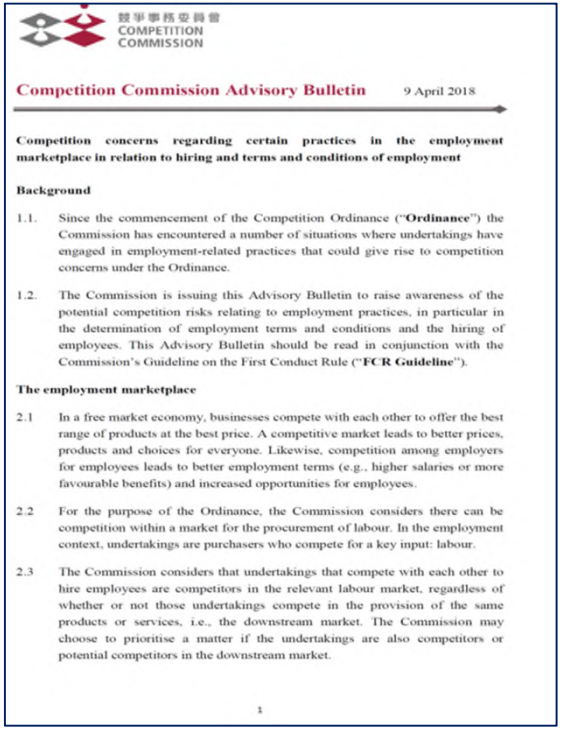
BOSTON — Attorney General Maura Healey today led a coalition of 11 state attorneys general in sending a letter to eight national fast food franchisors about "no-poach" agreements in franchise contracts, which restrict a franchisee's ability to recruit or hire employees of another franchisee of the same chain. Prompted by concerns that these agreements hurt low-wage workers and limit their ability to get better jobs, the state attorneys general have requested information and documents from these companies.

"No-poach agreements unfairly limit the freedom of fast-food and other low-wage workers to seek promotions and earn a better living," said AG Healey. "Our goal through this action is to reduce barriers and empower workers to secure better-paying and higher-skill jobs."

https://www.mass.gov/news/ag-healey-leads-multistate-investigation-of-worker-no-poach-agreements-at-national-fast-food

International Issues

- Hong Kong Competition Commission Guidance (April 2018)
- Japan Fair Trade Commission, Report of Study Group on HR and Competition Policy (Feb. 2018)
- Europe
  - "[C]ourts and competition regulators in Europe (Spain, the Netherlands, and Croatia) have all made major findings in the last eight years against companies in relation to national non-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors"



競爭事務委員會
COMPETITION COMMISSION

Competition Commission Advisory Bulletin 9 April 2018

Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment

Background

1.1. Since the commencement of the Competition Ordinance ("**Ordinance**") the Commission has encountered a number of situations where undertakings have engaged in employment-related practices that could give rise to competition concerns under the Ordinance.

1.2. The Commission is issuing this Advisory Bulletin to raise awareness of the potential competition risks relating to employment practices, in particular in the determination of employment terms and conditions and the hiring of employees. This Advisory Bulletin should be read in conjunction with the Commission's Guideline on the First Conduct Rule ("**FCR Guideline**").

The employment marketplace

2.1 In a free market economy, businesses compete with each other to offer the best range of products at the best price. A competitive market leads to better prices, products and choices for everyone. Likewise, competition among employers for employees leads to better employment terms (e.g., higher salaries or more favourable benefits) and increased opportunities for employees.

2.2 For the purpose of the Ordinance, the Commission considers there can be competition within a market for the procurement of labour. In the employment context, undertakings are purchasers who compete for a key input: labour.

2.3 The Commission considers that undertakings that compete with each other to hire employees are competitors in the relevant labour market, regardless of whether or not those undertakings compete in the provision of the same products or services, i.e., the downstream market. The Commission may choose to prioritise a matter if the undertakings are also competitors or potential competitors in the downstream market.

1

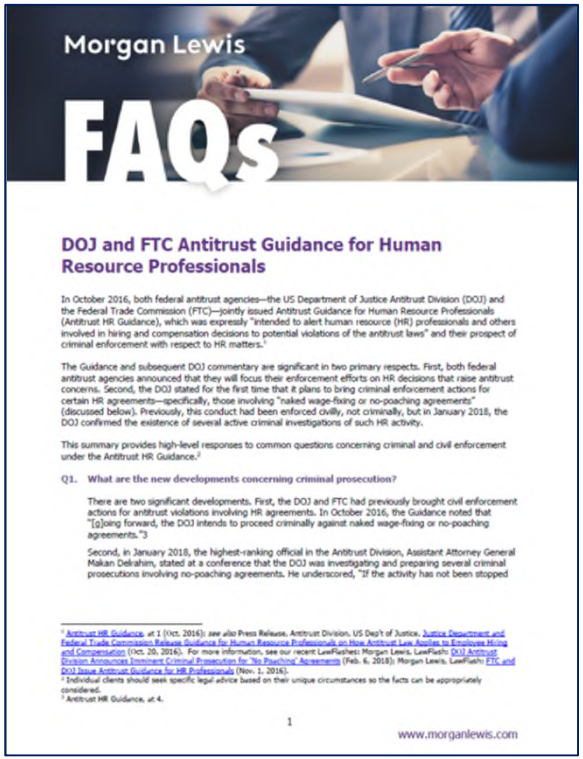
Recommended Steps

- Post–October 2016 conduct
  - "Naked" wage-fixing and no-poaching agreements
- Antitrust compliance training
  - HR professionals, legal and executives
  - Awareness of issues
- Review and modify policies and code of conduct
- Consult experienced antitrust counsel if wrongdoing is detected
  - Consider appropriate steps such as the Leniency Program
  - Other mitigation steps

- Due diligence in mergers and acquisitions
- Best practices in structuring whistleblowing procedures
- Assess international issues and jurisdictions

- Caution areas
  - Information Exchanges
    - Permissible only if carefully designed to conform with antitrust laws
  - Slippery slope issues
    - Trade associations, conferences, informal meetings

Resources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FAQs

DOJ and FTC Antitrust Guidance for Human Resource Professionals

In October 2016, both federal antitrust agencies—the US Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC)—jointly issued Antitrust Guidance for Human Resource Professionals (Antitrust HR Guidance), which was expressly "intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws" and their prospect of criminal enforcement with respect to HR matters.[1]

The Guidance and subsequent DOJ commentary are significant in two primary respects. First, both federal antitrust agencies announced that they will focus their enforcement efforts on HR decisions that raise antitrust concerns. Second, the DOJ stated for the first time that it plans to bring criminal enforcement actions for certain HR agreements—specifically, those involving "naked wage-fixing or no-poaching agreements" (discussed below). Previously, this conduct had been enforced civilly, not criminally, but in January 2018, the DOJ confirmed the existence of several active criminal investigations of such HR activity.

This summary provides high-level responses to common questions concerning criminal and civil enforcement under the Antitrust HR Guidance.[2]

Q1. What are the new developments concerning criminal prosecution?

There are two significant developments. First, the DOJ and FTC had previously brought civil enforcement actions for antitrust violations involving HR agreements. In October 2016, the Guidance noted that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[3]

Second, in January 2018, the highest-ranking official in the Antitrust Division, Assistant Attorney General Makan Delrahim, stated at a conference that the DOJ was investigating and preparing several criminal prosecutions involving no-poaching agreements. He underscored, "If the activity has not been stopped

[1] Antitrust HR Guidance, at 1 (Oct. 2016); see also Press Release, Antitrust Division, US Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016). For more information, see our recent LawFlashes: Morgan Lewis, LawFlash: DOJ Antitrust Division Announces Imminent Criminal Prosecution for 'No Poaching' Agreements (Feb. 6, 2018); Morgan Lewis, LawFlash: FTC and DOJ Issue Antitrust Guidance for HR Professionals (Nov. 1, 2016).

[2] Individual clients should seek specific legal advice based on their unique circumstances so the facts can be appropriately considered.

[3] Antitrust HR Guidance, at 4.

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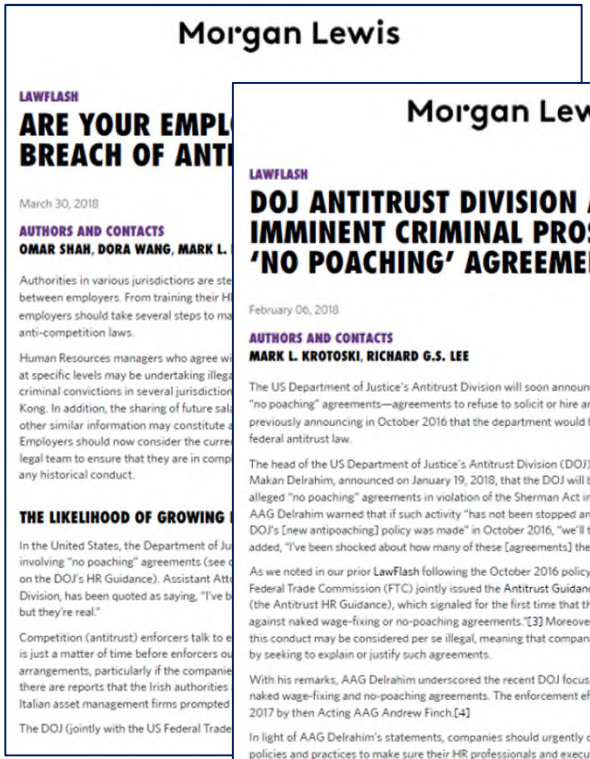
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LAWFLASH

ARE YOUR EMPL
BREACH OF ANTI

March 30, 2018

AUTHORS AND CONTACTS
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Authorities in various jurisdictions are ste
between employers. From training their H
employers should take several steps to ma
anti-competition laws.

Human Resources managers who agree w
at specific levels may be undertaking illega
criminal convictions in several jurisdiction
Kong. In addition, the sharing of future sal
other similar information may constitute a
Employers should now consider the curre
legal team to ensure that they are in comp
any historical conduct.

THE LIKELIHOOD OF GROWING

In the United States, the Department of Ju
involving "no poaching" agreements (see
on the DOJ's HR Guidance). Assistant Att
Division, has been quoted as saying, "I've b
but they're real."

Competition (antitrust) enforcers talk to e
is just a matter of time before enforcers ou
arrangements, particularly if the companie
there are reports that the Irish authorities
Italian asset management firms prompted

The DOJ (jointly with the US Federal Trade

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LAWFLASH

DOJ ANTITRUST DIVISION AN
IMMINENT CRIMINAL PROSEC
'NO POACHING' AGREEMENT

February 06, 2018

AUTHORS AND CONTACTS
MARK L. KROTOSKI, RICHARD G.S. LEE

The US Department of Justice's Antitrust Division will soon announce its f
"no poaching" agreements—agreements to refuse to solicit or hire another
previously announcing in October 2016 that the department would bring s
federal antitrust law.

The head of the US Department of Justice's Antitrust Division (DOJ), Assis
Makan Delrahim, announced on January 19, 2018, that the DOJ will bring it
alleged "no poaching" agreements in violation of the Sherman Act in the co
AAG Delrahim warned that if such activity "has not been stopped and cont
DOJ's [new antipoaching] policy was made" in October 2016, "we'll treat th
added, "I've been shocked about how many of these [agreements] there are,

As we noted in our prior LawFlash following the October 2016 policy annou
Federal Trade Commission (FTC) jointly issued the Antitrust Guidance for H
(the Antitrust HR Guidance), which signaled for the first time that the DOJ
against naked wage-fixing or no-poaching agreements."[3] Moreover, unde
this conduct may be considered per se illegal, meaning that companies cou
by seeking to explain or justify such agreements.

With his remarks, AAG Delrahim underscored the recent DOJ focus conce
naked wage-fixing and no-poaching agreements. The enforcement efforts w
2017 by then Acting AAG Andrew Finch.[4]

In light of AAG Delrahim's statements, companies should urgently consid
policies and practices to make sure their HR professionals and executives have not engaged in conduct that could be considered a no-poaching or wage-fixing agreement. The DOJ has made clear that engagement in such conduct or agreements after October 2016 when the policy was first announced may be criminally investigated and prosecuted.


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LAWFLASH

DOJ CONFIRMS ACTIVE 'NO-POACHING' CRIMINAL INVESTIGATIONS IN HEALTHCARE AND OTHER INDUSTRIES

May 22, 2018

AUTHORS AND CONTACTS
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A series of recent statements highlight the continuing enforcement by the US Department of Justice to focus on "no-poaching" and wage-fixing agreements with more enforcement actions expected to be announced in the near future.

The Antitrust Division at the US Department of Justice (DOJ) publicly acknowledged once again last week that active criminal investigations involving "no-poaching" agreements are underway. The most recent statement clarifies that a number of these criminal investigations are targeting companies in the healthcare industry.

In general, DOJ and the Federal Trade Commission (FTC) have described "no-poaching" agreements as agreements "with individual(s) at another company to refuse to solicit or hire that other company's employees." In addition, DOJ and the FTC are scrutinizing wage-fixing agreements, described as agreements "with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range."[1]

At an Antitrust in Healthcare Conference on May 17, Deputy Assistant Attorney General Bernard (Barry) A. Nigro noted that the Antitrust Division plans to bring criminal cases to redress antitrust violations in the healthcare industry for no-poaching agreements. As he explained:

> Combatting rising healthcare prices has been, and under the new Administration will continue to be, a priority for the Division. **We are investigating other potential criminal antitrust violations in this [health care] industry**, including market allocation agreements among healthcare providers and **no-poach agreements restricting competition for employees. We believe it is important that we use our criminal enforcement authority to police these markets**, and to promote competition for all Americans seeking the benefits of a competitive healthcare marketplace.[2]

Mr. Nigro's speech was the latest in a series by Antitrust Division leaders highlighting pending criminal

CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

RECENT CARTEL ENFORCEMENT TRENDS

Recent Cartel Enforcement Trends

- Large Cartel Enforcement Fines
- Leniency Program Questions

Global Cartel Enforcement Report

- Review key global trends
- Monitor recent fines and penalties
- Focus on key industries subject to cartel enforcement
- Identify new developments
- Subscribe: www.morganlewis.com/subscribe *(select "Cartel" on list of topics)*

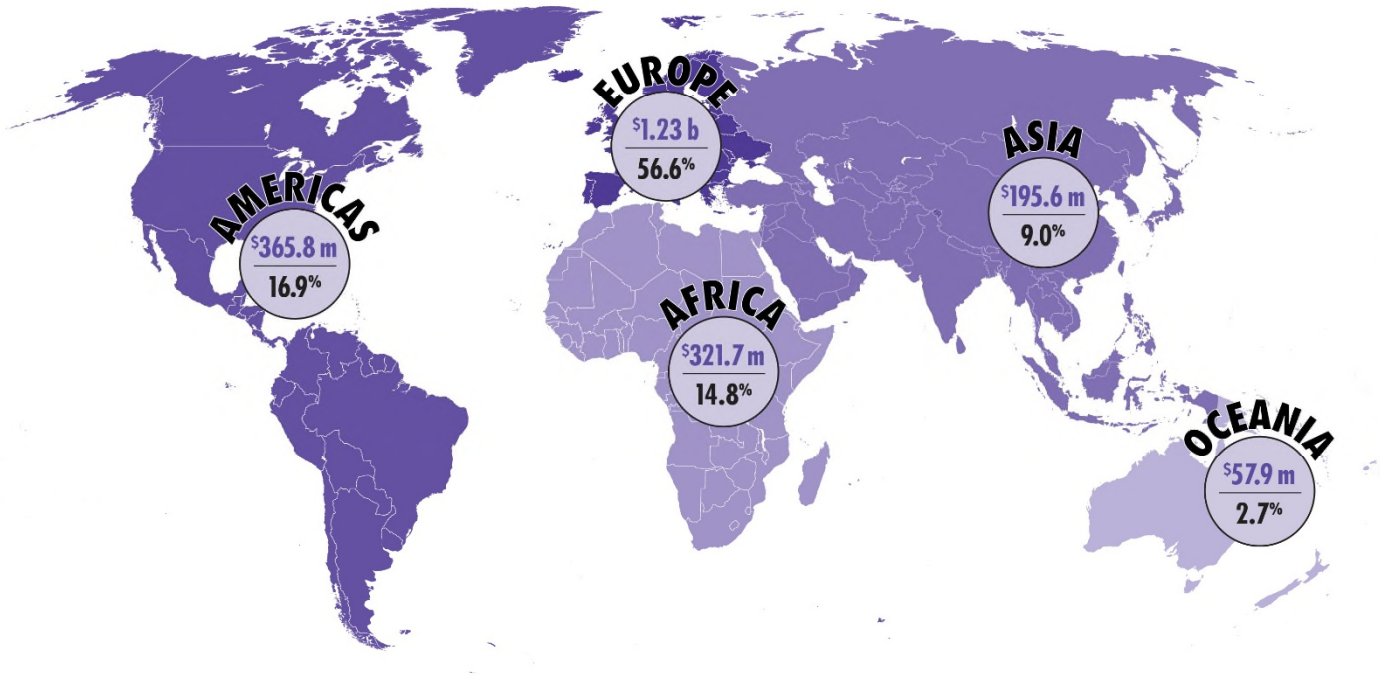
CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

CARTEL FINES

Global Cartel Fines

Through June 2018: $2.17 Billion

Fines by jurisdiction, with percentages of global fines



	FINES* BY JURISDICTION	% OF TOTAL GLOBAL FINES
EUROPE	**$1.23 b**	**56.6%**
European Union	$890.5 m	
Other	$336.9 m	
AMERICAS	**$365.8 m**	**16.9%**
United States	$109.8 m	
Brazil	$185.4 m	
Canada	$0.1 m	
Other	$70.5 m	
ASIA	**$195.6 m**	**9.0%**
South Korea	$134.0 m	
Japan	$17.6 m	
Russia	$11.0 m	
India	$8.0 m	
China	$0.5 m	
Other	$24.5 m	
AFRICA	**$321.7 m**	**14.8%**
Egypt	$316.5 m	
South Africa	$5.2 m	
OCEANIA	**$57.9 m**	**2.7%**
Australia	$57.9 m	

*Through June 30, 2018, and based on publicly available information where available.

During the First Half of 2018

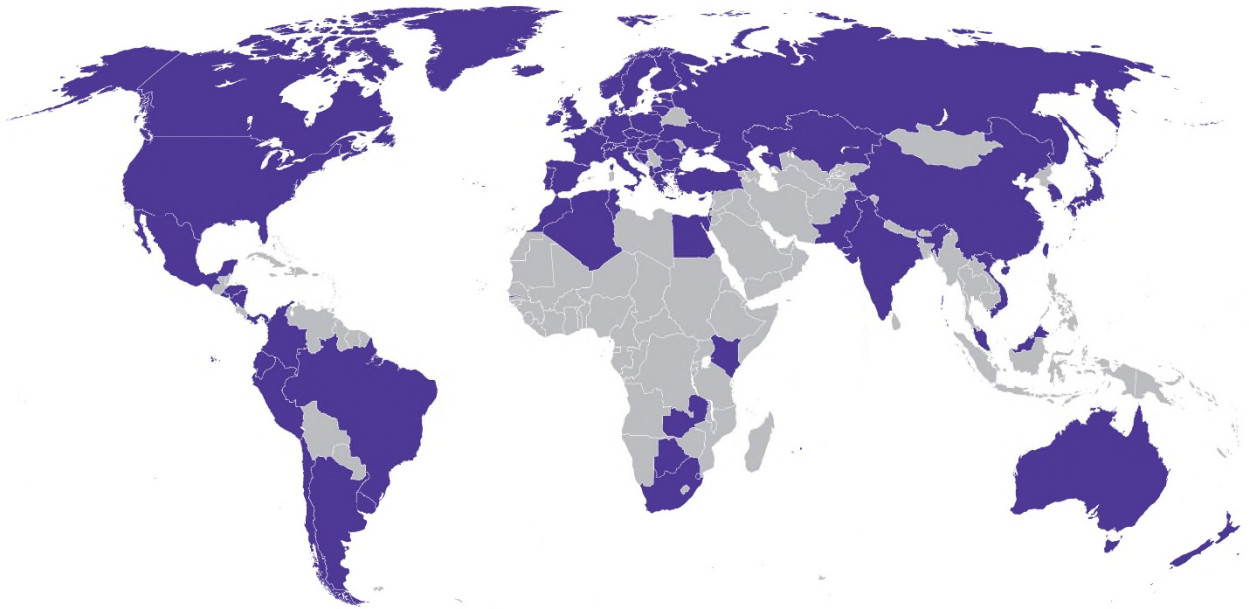
Jurisdiction (Country)	Fine Amount	Summary
Brazil	**301 million reais ($92.8 million)**	Cartel involving processors of frozen orange juice concentrate
	289.5 million reais ($79.5 million)	18 companies, 39 individuals, and three unions for cartel conduct in the sea salt market
	42.9 million reais ($11.6 million)	Two financial institutions and one individual for cartel conduct in the foreign exchange market involving the Brazilian real and offshore currencies
Cyprus	**31 million euros ($38 million)**	Eight banks for fixing the domestic interchange fee for bank and credit cards as well as merchant service charges
Egypt	**5.58 billion Egyptian pounds ($316.2 million)**	Four pharmaceutical companies for fixing prices on small-and medium-sized pharmacists
European Commission	**395 million euros ($486.5 million)**	Five maritime car carriers for participating in a cartel concerning intercontinental maritime transport of vehicles
	254 million euros ($311.6 million)	Eight producers of capacitors for coordinating future behavior and avoiding price competition
	76 million euros ($93.6 million)	Three spark plug companies for agreeing on prices and the share of supplies to specific customers and the respect of historical supply rights
	75 million euros ($92.4 million)	Three car part suppliers involved with hydraulic braking systems (HBS) and the supply of electronic braking systems (EBS) for coordinating pricing elements

Significant Fines Continued

Jurisdiction (Country)	Fine Amount	Summary
Romania	**73.1 million lei ($18.8 million)**	Six companies and a local electricity holding for bid-rigging
Spain	**91 million euros ($112.8 million)**	Four banks for agreeing to offer interest rate derivatives
	68 million euros ($83.8 million)	Nine courier companies for carving up the market for courier and business-parcel delivery services
South Korea	**22.7 billion won ($20.9 million)**	Five marine-cable companies for rigging bids for cables used on LNG, container, and other ships
	11.6 billion won ($ 10.8 million)	Four wholesalers making consignment sales in agricultural product markets for farmers and others for agreeing to fix commissions for produce sold in a local agricultural produce market
	10.8 billion won ($10.1 million)	14 companies for rigging bids to provide aerial photography services to the Korean government
United States	**$90 million**	An international financial services company for conspiring in the foreign currency exchange (FX) market
	$12 million	A Japanese automotive parts manufacturer for conspiring to fix prices, rig bids, and allocate customers for automotive steel tubes

LENIENCY PROGRAM QUESTIONS

78 Countries Have Cartel Immunity/Leniency Programs



Albania
Algeria
Argentina
Australia
Austria
Belgium
Bosnia & Herzegovina
Botswana
Brazil
Bulgaria
Canada
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Croatia
Czech Republic
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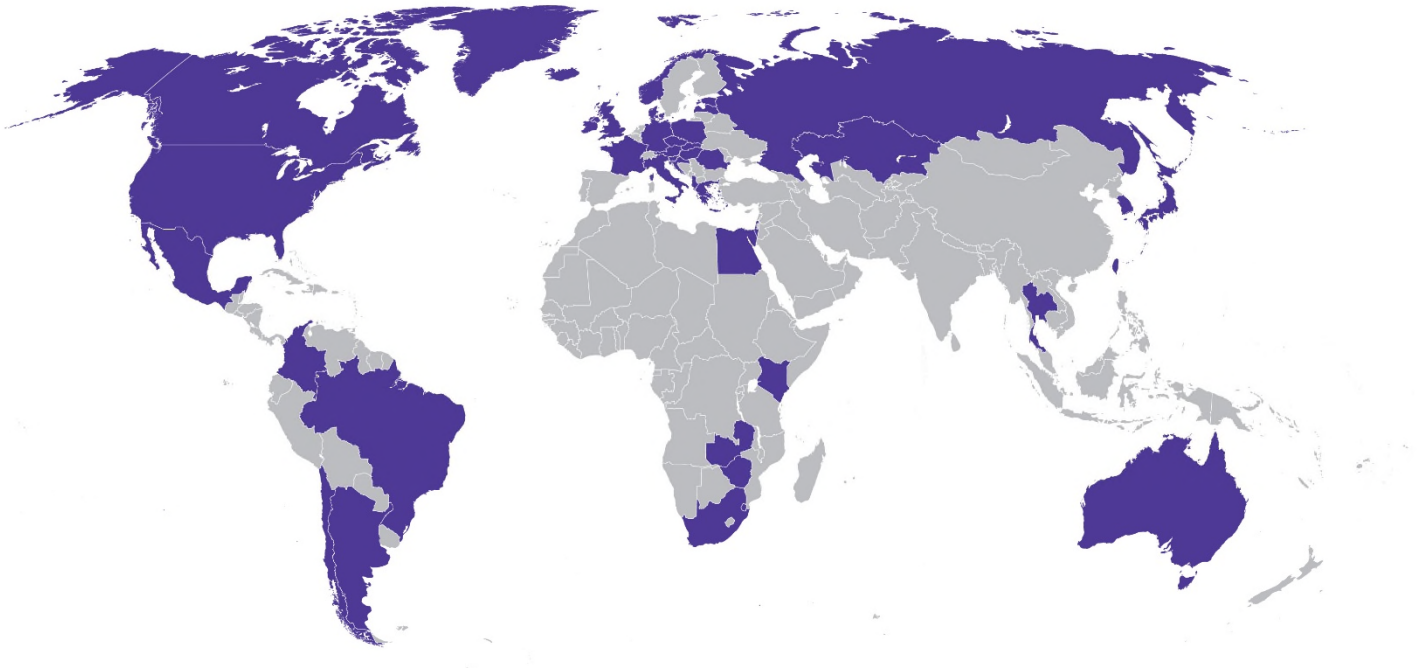
Kenya
Latvia
Lithuania
Luxembourg
Macedonia
Malaysia
Mauritius
Mexico
Morocco
Netherlands
New Zealand
Nicaragua
Norway
Pakistan
Panama
Peru
Poland
Portugal
Romania
Russia
Singapore
Slovakia
Slovenia
South Africa
South Korea
Spain
Sweden
Switzerland
Swaziland
Taiwan
Tunisia
Turkey
Ukraine
Uruguay
United Kingdom
United States
Vietnam
Zambia

43 Countries Have Criminal Penalties

For Cartel Violations or Convictions



Argentina
Australia
Austria
Brazil
Canada
Chile
Colombia
Croatia
Czech Republic
Denmark
Egypt
Estonia
France
Germany
Greece
Greenland
Hong Kong
Hungary
Iceland
Ireland
Israel
Italy
Japan
Kazakhstan
Kenya
Latvia
Malta
Mexico
Norway
Poland
Romania
Russia
Slovakia
Slovenia
South Africa
South Korea
Swaziland
Taiwan
Thailand
United Kingdom
United States
Zambia
Zimbabwe

Criminal Penalties: Statutory Maximum

Corporations

- Increased maximum fines from $10 Million to **$100 Million**

  [Antitrust Criminal Penalty Enhancement And Reform Act 2004]

- Alternative Fine Provision

  Twice the financial gain to the defendant or twice the financial loss to the victim

Individuals

- Prison terms up to **10 years**
- Statutory fines of **$1,000,000**
- More if “twice” the gain or loss

Automotive Parts

- **Key Developments**
  - DOJ Investigation Commenced Feb. 2010
  - Prosecution
    - **49** corporations
    - **65** individuals
      - **30 executives** convicted with prison terms ranging from **one year and one day** to **24 months**
  - Corporate fines exceeding **$2.9 billion**
  - Nov. 2017, Green Tokai acquittal (SDOH)
  - May 31, Manufacturer of Steel Tubes conviction and **$12 million** fine

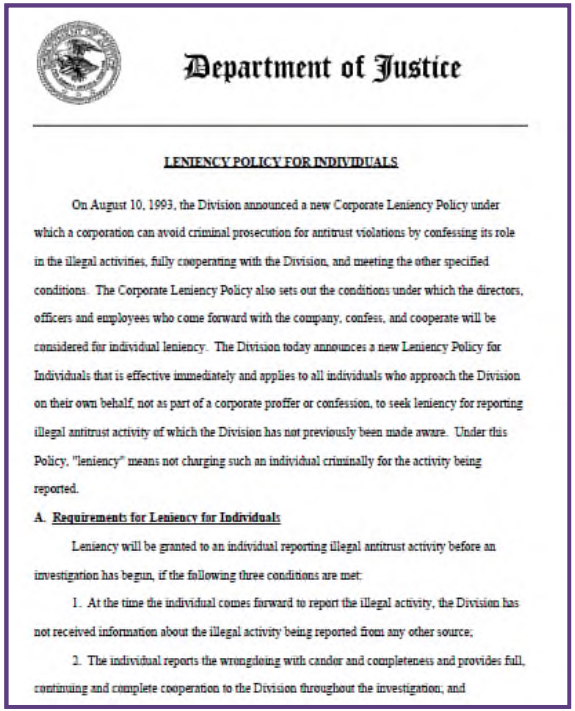
Automotive Parts

- **Key Developments**
  - EU: Feb. 21, **$93.6 million** imposed on three spark plug companies for agreeing on prices and the share of supplies to specific customers and the respect of historical supply rights
  - EU: Feb. 21, **$92.4 million** on three car part suppliers involved with hydraulic braking systems (HBS) and the supply of electronic braking systems (EBS) for coordinating pricing elements
  - Australia: May 16, **$34.6 million** in fines concerning wire harnesses; largest fine under Competition and Consumer Act of 2010
  - Brazil: May 9, **$778,000** in fines for two companies on various auto parts

Leniency Program

- **Leniency Program**
  - 1978: Established
  - 1993: Corporate Leniency Program Modified
  - 1994: Individual Leniency Program

- **Benefits**
  - No criminal convictions for company, executives or employees
  - No criminal fine but must make restitution
  - No prison
  - De-treble civil damages
    - Under ACPERA, single damages and no joint & several liability



Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

Leniency Conditions

- Leniency conditions for corporation **reporting illegal activity**:

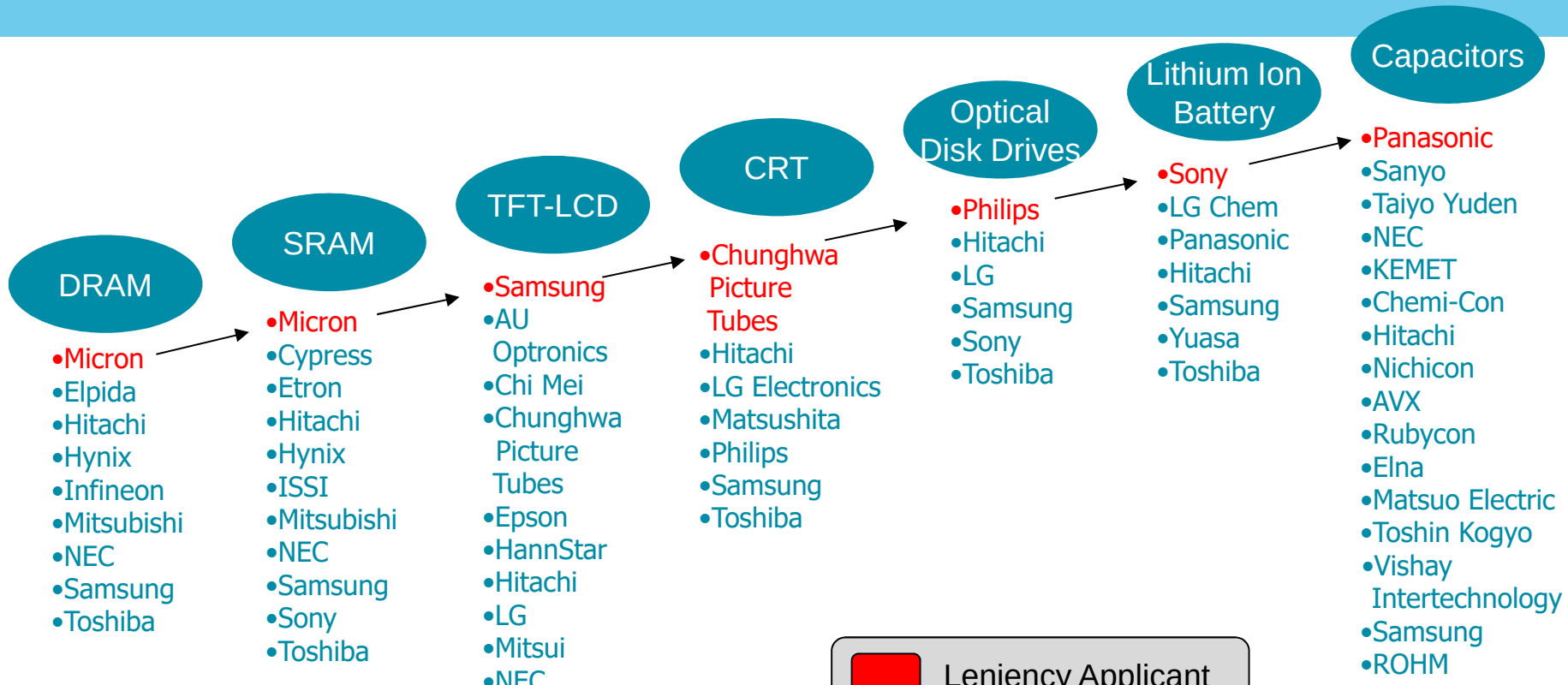
1) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2) The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5) Where possible, the corporation makes restitution to injured parties;
6) The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

https://www.justice.gov/atr/file/810281/download

Leniency Plus

- If too late to obtain leniency in **investigation X**, may still qualify for reduction in penalties in **investigation Z** by becoming leniency applicant in separate **investigation Z**
- Obtain full benefits of leniency in **investigation Z**
- DOJ will recommend that the company receive substantial discount in sentencing for **investigation X** to account for cooperation both in **investigation X** and for leniency cooperation in **investigation Z**

Leniency Plus Chain Reaction



Electrolytic Capacitors

- **Key Developments**
  - On January 5, the Competition and Consumer Commission of Singapore (CCCS) imposed a fine of around **$14.7 million** on five electrolytic capacitor manufacturers
  - On March 21, the European Commission fined eight producers of electrolytic capacitors of around **$311.6 million** for cartel conduct from 1998 to 2012.
  - On June 27, in NDCA, a second executive pleaded guilty to a conspiracy to fix prices and rig bids for electrolytic capacitor sold in the US and elsewhere.
  - On October 3, in NDCA, Electrolytic Capacitor manufacturer fined **$60 million** and sentenced to a five-year term of probation; implement an effective compliance program and submit annual written reports on its compliance efforts.
- **Looking Ahead**
  - So far, DOJ has convicted eight companies resulting in fines of more than **$150 million** and charged 10 individuals for conspiring to fix prices of electrolytic capacitors.
  - Further activity in other jurisdictions.

Leniency Costs and Benefits Under Review

- Do the benefits justify the costs?
  - Have the costs associated with seeking leniency have become too high for some cases based on the need to (1) seek leniency in multiple jurisdictions with different demands and requirements; and (2) face possible damages litigation in various jurisdictions throughout the world.

- June 5, 2018, Deputy Assistant Attorney General Richard Powers noted leniency provides substantial benefits:
  - "As worldwide exposure increases, so do the potential benefits of leniency. The benefits of seeking leniency therefore still outweigh the increasing costs."
  - Adding that international enforcers "can increase our cooperation and our shared commitment to coordinating, where and to the extent possible, to decrease burdens on applicants" and noted the need to "engag[e] with foreign enforcers, and also the defense bar, to examine possible ways to reduce unnecessary burdens on leniency applicants."

- Coordination areas:
  - 1) Timelines and deadlines to allow the applicant to meet them in multiple jurisdictions;
  - 2) Tailor document demands to get the necessary evidence from the leniency applicant without unnecessary burden; and
  - 3) Where possible, coordinate the timing and locations of interviews to alleviate burdens on applicants and employees.

Cartel Enforcement Issues

- **Compliance**
  - Training
  - Guidelines
  - Imposed in recent criminal cases
- **Dawn Raids**
  - Training
  - Guidelines
- **Cartel Enforcement Cases**
  - DOJ
  - Global coordination
  - Leniency marker requests
  - Advising companies and executives concerning investigations by DOJ and other enforcers

Morgan Lewis

DAWN RAID GOLDEN RULES

ALERT AND ORGANIZATION

- **Don't obstruct**: Be professional and cooperative.
- **Don't destroy** documents or other evidence.
- **Call counsel** immediately to protect your rights.
- **Keep a record** of what is searched, what is taken, who was involved in the search, and persons in focus.
- **Know your rights:**
  - The search should be limited to the scope of the warrant.
  - You have the right to receive inventory of materials seized.
  - You have the right to withhold or receive back-privileged materials.
  - In the United States, interviews on substantive topics are voluntary and may be refused. You may insist on counsel being present.
  - In the European Union, you must answer purely factual questions but may refuse to answer questions to which the answers may be self-incriminating.

STEP-BY-STEP RESPONSE

1. **Ask to see** investigators' identification and documents authorizing the search.
   a. Confirm that your company's premises are permitted to be searched.
   b. Keep a record of the investigators' names and affiliations.
2. **Call counsel** immediately.
   a. Ask investigators to wait for counsel to arrive (they may refuse).
   b. Put counsel in touch by phone with investigators.
3. **Assign a point of contact** to interface with the investigators and organize the response.
   a. Provide a conference room free of business materials and away from business operations for investigators.
   b. Assign individuals to "shadow" investigators.
   c. Interface with outside counsel.
4. **Ensure document preservation**, send out a litigation hold notice immediately, and take steps to ensure that all relevant evidence is preserved—regardless of location.
5. **"Shadow" the search**—assign someone to follow each investigator.
   a. This person should be trained to understand the rights of both the company and individuals.
   b. Ensure that company employees are cooperating with the search.
   c. Keep a record of all items searched and seized.
   d. Involve external counsel for any questions regarding privilege.
6. **Make copies of all materials seized**—one copy for investigators and one copy for company files.
7. **Protect privileged materials** by objecting to the seizure of any privileged material and agreeing to a procedure to ensure that any privileged materials seized are returned. Involve outside counsel in this exercise.
8. **Do not break seals** where the investigators have sealed the company's premises (e.g., overnight).

HOW WE CAN HELP

If you need assistance with more detailed dawn raid guidelines or training, contact a Morgan Lewis lawyer listed below:

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CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

PREMERGER NOTIFICATION UNDER THE HART SCOTT RODINO ACT (HSR ACT): RECENT DEVELOPMENTS AND BEST PRACTICES

Premerger Notification under the Hart Scott Rodino Act (HSR Act) Best Practices

- HSR Act: High-level summary of procedure and strategy
- DOJ pledges quicker merger reviews: What this means and likely outcome
- Document creation: Creating bad 4(c)/(d) documents can delay or imperil HSR approval; discussion of practical tips for document creation
- Information exchanges: Discuss approaches to maximize information exchanges necessary to complete an M&A transaction while minimizing antitrust risk
- HSR traps for the unwary: Avoid most frequent HSR mistakes

HSR Nuts & Bolts: The Basics

- Pre-closing notification (a.k.a. suspensive)
  - Transaction value above $337.6 million ***or***
  - Transaction value above $84.4 million and Size of Person test is met
    - Keep in mind that "value" means *HSR value*
- Each side of the transaction files
  - Filings submitted to DOJ and FTC
  - Fees: $45K, $125K, $280K depending on deal value
- Exemptions, exemptions, exemptions
- $41,484 per day in civil fines

HSR Nuts & Bolts: The Basics

- Signed writing
  - Non-binding LOI/term sheet
- Confidentiality
  - Information confidential
  - Public notice if ET granted
  - Informal public notice if government contacts third parties
- Assets, voting securities, exclusive IP licenses
  - Non-passive minority acquisitions of voting securities
  - Conversions into voting securities
  - Economic control of partnership or LLC
  - Joint venture formations

HSR Nuts & Bolts: The Basics

- Initial 30 calendar day waiting period
  - Early termination (ET) of the waiting period
  - "Pull & refile" (another 30 days)
  - Second request (6-plus months)
    - 9.8 months average from announcement to agency action in first three quarters of 2018, down slightly from 2017 but up from prior years
  - Timing agreement
    - Under HSR Act, DOJ and FTC have 30 days to make decision
    - Merging parties and DOJ/FTC typically entering into a Timing Agreement, giving DOJ/FTC additional time (e.g., ~70-90 days total) to make decision; in return DOJ/FTC gives relief to Second Request burdens

DOJ Proposes Shorter Second Request Review Timeline

- AAG Delrahim announced goal of 6 months for Second Request reviews, including following steps
  - Opening the front office to an early, introductory meeting with key executives
  - Publishing a model voluntary request letter asking the parties to provide crucial information early in the investigation
  - Outlining a model timing agreement to reduce the number of depositions the government will take and seeking documents from fewer custodians
- Will these steps make Second Requests and review period shorter?

Document Creation – 4(c)/(d)

- All studies, surveys, analyses and reports
- That were prepared by or for any officers or directors
- Discussing the proposed acquisition
- Addressing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and/or cost or revenue synergies/other efficiencies of the deal

Document Creation – 4(c)/(d)

- Ordinary course documents of Seller if used by Buyer
  - Be careful what is put in dataroom
- Board minutes may need to be submitted, but non-deal content can be redacted
- Cannot redact content specific to other deals from 4(c) documents other than board minutes
  - Consider replacing consolidated board deck reviewing all deals with separate documents for each deal
- 4(c) documents for prior iteration of the deal if used to analyze new iteration of same deal are 4(c)

Document Creation: Best Practices

- Rule No. 1: replace writing with oral
- Rule No. 2: write clearly and avoid hyperbole (no price increases)
- Rule No. 3: consult with legal before putting pen to paper
- Rule No. 4: have counsel review drafts
- Rule No. 5: school bankers, bankers, bankers and other consultants

Quotes from Bazaarvoice Transaction

"our only meaningful competitor"

"gives us complete ownership of the category"

"Monopoly in the market"

"improves our pricing power"

"Better monetization w/o pricing pressure"

"essentially a duopoly"

"less pricing dilution"

"removes any cheap entry point for a future competitor"

"making future competition extremely difficult"

Document Creation Best Practices Also Important for "Non-Issue" Deals

- Imprecise, sloppy, or exaggerated statements can lead to unforeseen delays for otherwise non-issue deals
- Example (Project Bear):
  - "Would eliminate a competitor for [BIDDING OPPORTUNITY], leaving only the incumbent as a viable threat"
    - **What business person meant**: Buyer, Target and Incumbent made it to final round of bid process for important prospect, increasing chances that Buyer would win post-closing
    - **What FTC/DOJ Read**: There may be a merger to monopoly for a particular type of customer, need to investigate
    - **Outcome**: Investigation opened; delaying approval by a few weeks

Information Exchanges During Due Diligence

- Two Antitrust Concerns
  - Taking control of Target ("gun jumping" risk – Section 7A)
  - Agreements that reduce competition (Sherman Act)

- Practical Risks
  - Sherman Act risk requires an agreement
  - One-way information exchanges rarely reduce competition
    - Customer level product pricing; product level P&Ls; R&D by program
    - Employee specific salary information
  - Clean team solutions abound

- Leverage, leverage, leverage

HSR: Traps for the Unwary

- Two HSR violations result in fines more than any other: misuse of Investment Only Exemption; and 1 year and 5 year rules
- **Investment Only Exemption**
  - 10% or less of an issuer's voting securities if held solely for purposes of investment
  - Inconsistent actions include (not limited to):
    - Having a representative serve as a board member of the issuer
    - Requesting membership on the board of the issuer
    - Having discussions with third parties to gauge their interest in employment at the issuer as an officer or director
    - Making a public announcement that the Acquiring Person is ready to propose a slate of directors
    - Attempting to influence an issuer's merger or acquisition strategy or decision making (other than inquiring with the issuer to assess whether the particular merger or acquisition is in the best interest of shareholders)
    - Acquiring 10% or less of an issuer with the intent to subsequently acquire control of the issuer
    - Attempting to influence two merging parties' antitrust defense strategy
    - Engaging in written and in-person communications with an issuer regarding its business strategy (*e.g.*, sales growth and acquisition plans)
- **1 year and 5 year Rules**
  - HSR approval is good for only 1 year; need to re-file after 5 years
  - Important to consider when executives exercise options or other conversions into voting securities (recent FTC focus)

CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

BIG DATA

Big Data - Overview

- Treatment of "big data" and merger control laws
  - Contrasting views in the EU and the US
  - Potential theories of harm
- Treatment of "big data" and merger control laws
  - Loss of privacy as a theory of harm?
  - Factors restricting the anticompetitive use of data
  - New merger control thresholds as a result of Big Data

Treatment of "big data" and merger control laws Contrasting views in the EU and the US

"[Data] *can be a barrier to entry and since it can be a barrier to entry, of course if you build huge amounts of data, it can also foreclose the market* [...] *If you don't handle the negative side of big data there is always a risk of a backlash"*

Margrethe Vestager, EU Competition Commissioner, 12 December 2017

vs

"I am therefore wary of claims that "big data" is necessarily a barrier to entry or that, on its own, it constitutes evidence of market power or an unfair advantage. Antitrust agencies need to appreciate differences in data and assess data issues on a case-by-case basis."

Makan Delrahim, Assistant Attorney General for the Antitrust Division, US DOJ, 17 October 2018

Treatment of "big data" and merger control laws
Potential Theories of Harm

Potential Horizontal Effects

Microsoft/LinkedIn (EC Case M.8124, 6 December 2016)

- The European Commission considered the impact of access to a combined data set (of individuals' jobs, career history, professional connections, email and search behaviour) ***on the online advertising market***. The European Commission identified the following possible horizontal issues:
  i. an *increase in* ***market power*** *in the hypothetical market for the supply of data*
  ii. the *increase of* ***barriers to entry/ expansion*** in that market for actual or potential competitors that need that data; and
  iii. an ***elimination of competition between Microsoft and LinkedIn***, which could have been competing prior to the transaction on the basis of the data they each controlled.
- The European Commission did not find any horizontal concerns as:
  - the parties did not at the time market data available to third parties for advertising purposes
  - there would remain large amounts of user data available valuable to advertisers
  - the parties were small players in the relevant market and only competed with each other to a very limited extent in online advertising.

Treatment of "big data" and merger control laws
Potential Theories of Harm

Potential Vertical Effects

Facebook/Whatsapp (EC Case M.7217, 3 October 2014)

- The European Commission considered whether Facebook would acquire ***data that would likely strengthen its position in downstream online advertising markets***, by enabling it to use Whatsapp-generated data to better target ads to Facebook and Instagram users.
- The European Commission concluded that the merger did not raise vertical concerns for the following reasons:
  - i. Whatsapp generated data (user names, mobile phone numbers, and certain metadata) were ***not useful for advertising purposes***
  - ***ii.*** ***large amounts of valuable data*** not within Facebook's exclusive control ***would remain available*** to Facebook's competitors
  - iii. there would remain a sufficient ***number of market participants that also collected user data*** (e.g. data analytics services providers, data brokers, and competitors collecting the data themselves).
- The European Commission therefore concluded that the merging parties' data would not provide the parties with a non-replicable advantage.

Treatment of "big data" and merger control laws
Loss of privacy as a theory of harm?

Initial approach: privacy is not a competition law concern

- "*Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of EU data protection rules*" (*Facebook/Whatsapp* EC Case M.7217, 3 October 2014, Press Release)

Possible evolution of privacy as a parameter of competition

- "*Very few people realize that, if you tick the box, your information can be exchanged with others .... Actually, you are paying a price, an extra price for the product you are purchasing. You give away something that was valuable. I think that point is underestimated as a factor as to how competition works*."

  Margrethe Vestager, EU Competition Commissioner, 22 January 2015

- Companies may compete on the basis of their privacy policies see e.g. DuckDuckGo "*the search engine that doesn't track you*" or the Telegraph messaging app, offering end-to-end encryption

Treatment of "big data" and merger control laws
Factors restricting the anticompetitive use of data

- **Data is non-rivalrous** – the collection of data by one market player does not normally prevent another player from obtaining the same data from the same individual
- **Multi-homing** – users tend to offer their data to competing service providers in order to gain access to various services
- **Dynamic markets** – technology markets are characterised by "disruptive innovation" making it difficult for companies to attain and sustain positions of market power
- **Third party data brokers** – provide an alternative data source possibly counteracting input foreclosure concerns (although availability may be restricted by contractual or regulatory rules on privacy)
- **Procompetitive aspects of big data sets**

"*Data can help to improve an undertaking's product or service.* [e.g.] *by learning effects as in the case of web search engines.* […] *Access to data can also enable firms to exploit new business opportunities*. […] *Data can also be used to better target potential customers and to provide them with individualized advertising, services or products*."

French and German Competition Authorities' Joint Paper: *Competition Law and Data*, 10 May 2016.

Treatment of "big data" and merger control laws
New merger control thresholds as a result of Big Data

Germany

- An alternative, value-based merger control threshold came into force in 2017 which aims to capture mergers, *inter alia* in the digital sector, with significant potential competition effects that would otherwise fall below the turnover thresholds. Austria passed similar amendments
- The German competition authority will now review mergers where, among other requirements, the value of the ***consideration paid exceeds €400 million*** and where the ***target is active in Germany "at a significant scale"*** (i.e. it has a "local nexus")

The European Union

- The European Commission launched a ***public consultation on the EU merger control thresholds*** in October 2016, enquiring whether thresholds based on transaction value might be necessary to prevent transactions involving companies with low or no turnover, but that are nonetheless economically significant, from escaping scrutiny (e.g. in the digital space)
- The responses to the consultation were published in July 2017. They show that the majority of respondents do not consider the introduction of complementary jurisdictional thresholds necessary

CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

NATIONAL SECURITY INVESTMENT REVIEW AND ADVANCED TECHNOLOGIES

National Security Investment Review - Overview

- The Proposed EU Regulation
- The Proposed UK Regime
- The German Regime
- The French Regime

National security investment review
The Proposed EU Regulation

- The Proposed EU Regulation would ***enhance cooperation*** between the European Commission and Member States on security or public order screening of FDI by:
  - setting out ***basic requirements for an FDI review*** by an EU Member State
  - establishing a ***cooperation mechanism*** between EU Member States and the Commission
  - establishing ***European Commission screening for FDI that may affect projects of "Union interest"***

National security investment review
EU Proposed Regulation (continued)

Basic requirements for FDI screening schemes of EU Member States:

- judicial redress
- non-discrimination between different third countries
- deadlines
- transparency
- a non-exhaustive list of factors that may impact security or public order including:
  - ***critical infrastructure*** (e.g. communications, data storage, financial infrastructure)
  - ***critical technologies*** (e.g. AI, robotics, semiconductor technology with dual use applications, cybersecurity, space or nuclear technology)
  - ***security of supply*** of critical inputs
  - access to ***sensitive information*** or the ability to control sensitive information
  - whether the purchaser is, or is controlled by, the ***government of a third country***

National security investment review
EU Proposed Regulation (continued)

Formal cooperation mechanism between the Commission and EU Member States

- obligations on EU Member States to ***notify to the Commission and other Member States of FDI that they are screening within five working days*** *from the beginning of the screening process*
- the European Commission and EU Member States may ***request information*** necessary to provide an opinion or comments
- An EU Member State may ***comment on FDI in another EU Member State within 25 working days*** of receiving any requested information, if the FDI may affect its security or public order
- The European Commission may issue ***non-binding opinions*** on FDI in EU Member States ***within 25 working days*** of receiving any requested information
- An EU Member State in which the FDI is planned shall give ***"due consideration"*** to the other EU Member State comments and to the European Commission's opinion

National security investment review
The Proposed EU Regulation (continued)

European Commission screening for FDI that may affect projects of Union interest

- the European Commission may screen FDI in EU Member States and ***issue a non-binding opinion*** to an EU Member State if the FDI may affect, on grounds of security or public order, programmes of "***Union interest***" (such as the Horizon 2020 programme (research), the Galileo satellite programme (space), the Action Plan for 5G (telecoms) and certain EU transport and energy initiatives).
- The European Commission may request from the EU Member State ***any information necessary to issue the opinion*** and must issue its opinion ***within 25 working days*** of receiving any requested information
- The EU Member State shall take "***utmost account***" of the Commission's opinion and explain to the European Commission in case its opinion is not followed.

National security investment review
The Proposed EU Regulation (continued)

- The Proposed EU Regulation ***would <u>not</u>***
  - ***create EU-level screening of FDI,***
  - ***harmonize EU Member States' FDI screening mechanisms ,or***
  - ***require EU Member States to adopt an FDI screening mechanism***
- The European Parliament and Counsel are discussing the Proposed EU Regulation with the aim of possibly reaching an ***agreement by the end of 2018***
- There is ***currently no comprehensive EU legal framework*** to address national security concerns regarding non-EU FDI (only sector specific rules e.g. regarding gas and electricity transmission system operators)
- 12 Member States currently have legislation for the review of FDI on security or public order grounds (Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the UK)

National security investment review
The Proposed UK Regime

- The UK Government is considering reforms that would significantly increase its powers to intervene in UK transactions on national security grounds. Currently the UK Government review is limited to issues of specified public policy, namely national security (including public security), financial stability, and media plurality
- Parties may ***voluntarily notify*** transactions that (i) potentially give rise to ***national security concerns*** and (ii) ***involve a Trigger Event.*** The UK Government anticipates ***ca 200 voluntary notifications per year***

National security concerns are most likely to arise in the following core areas:

  - ***Essential national infrastructure*** (e.g. telecommunications, defence energy, transport, civil nuclear power)
  - ***Advanced technologies*** (e.g. AI, robotic systems, computing, cryptography, nanotechnologies and quantum technology)
  - ***Critical direct suppliers*** to the UK government and emergency services
  - ***Military and dual-use technologies***

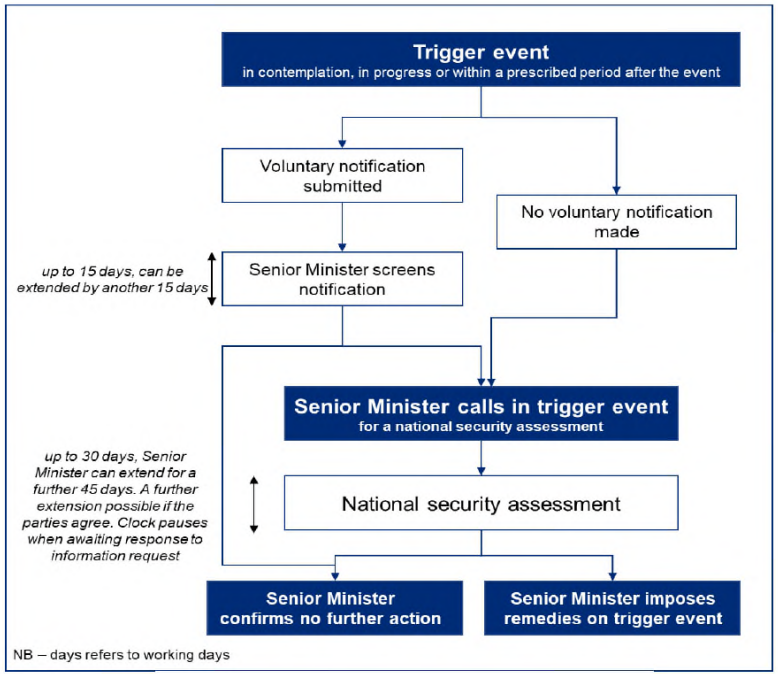
National security investment review
The Proposed UK Regime

Trigger Events may include inter alia:

- the acquisition of more that ***25%*** of the votes or shares in an entity
- the acquisition of ***significant influence*** or control over an entity (e.g. the right to appoint a director) or the acquisition of ***further significant influence*** over an entity
- the acquisition of more than ***50%*** of an asset (e.g. land or IPR)
- the ***acquisition of significant influence or control over an asset***
- In exceptional circumstances ***loans*** could give rise to national security concerns

- The UK Government would also have the ***powers to "call in"*** a Trigger Event for a full ***national security assessment*** where a transaction is not notified. This would prevent the parties from completing the Trigger Event until the senior minister clears it

National security investment review
The Proposed UK Regime - Screening, call-in and assessment process



The initial screening phase would last ***15 working days*** from notification (extendable by an additional 15 working days). The senior minister will likely assess the following risks:

- ***Target risk*** - i.e. that associated with the entity or asset being acquired
- ***Trigger event risk*** - i.e. that associated with the transaction itself
- ***Acquirer risk*** – i.e. that associated with the acquirer in question

If the senior minister ***calls in*** a Trigger Event for a full ***national security assessment*** then the review would last an ***additional 30 working days*** (extendable by a further 45 working days)

The senior minister could impose ***interim restrictions*** (e.g. on information sharing). The parties would be prohibited from executing the relevant Trigger Event until clearance

At the end of the review the senior minister would decide whether to ***clear, impose conditions, block or unwind*** a notified Trigger Event

Source: National Security and Investment,

A consultation on proposed legislative reforms, BEIS, July 2018

National security investment review
The UK Proposed Regime (continued)

Remedies

- The senior minister will have ***wide discretion*** in imposing remedies.
- If the senior minister concludes that no remedy would address the national security risk, the senior minister would have the ***power to block or unwind the Trigger Event***.
- Sanctions for non-compliance could include ***criminal custodial sentences of up to five years***, ***civil fines*** and/or ***director disqualifications***.

Judicial oversight

- The UK Government's powers will be ***subject to judicial oversight in the High Court***, and the appeals process will be "based on and aligned with judicial review principles."
- Appeals against financial civil penalties will be subject to a full merits review

CMA reviews

- The UK Government anticipates the national security assessment to run ***in parallel*** to any CMA review and for the UK Government to be able to ***overrule any contradictory CMA decision*** clearing, prohibiting or imposing remedies on the transaction

Status

- The UK Government is analysing feedback to its consultation ending on 16 October 2018

National security investment review
The German Regime

- The German Federal Ministry of Economic Affairs and Energy (the "Ministry") may review and prohibit certain direct or indirect acquisitions of German companies by non-German investors

Mandatory filings (sector-specific approach)

- Parties are required to obtain clearance for transactions if they:

(i) directly or indirectly result in a foreign investor (whether an EU/EFTA or non-EU/EFTA investor) acquiring ***voting shares exceeding 25%*** of a German company*;* and

(ii) involve a German target that falls within a ***specific sensitive sector*** (***defence and specific IT-security companies*** (e.g. that are involved in cryptography for government classified information))

- A transaction shall be deemed cleared if the Ministry does not initiate a formal review within three months from notification. If the Ministry does initiate a formal review it will have ***three months*** in which impose remedies, prohibit or clear the transaction

National security investment review
The German Regime (continued)

Voluntary filings (cross-sector approach)

- If the transaction falls outside the sector-specific approach then the parties may apply for a ***certificate of non-objection*** from the Ministry which would take ***two months***
- If the acquisition is not notified, the Ministry may initiate an investigation ***within three months*** of becoming aware of the transaction if:
  - i. it directly or indirectly results in the acquirer's ***voting shares exceeding 25% of a German company***;
  - ii. the acquirer is a ***non-EU or non-EFTA entity***; and
  - iii. the acquisition may lead to ***risks to public order or security*** , i.e. the domestic target falls within a "catalogue industry". The non-exhaustive list of "catalogue industries" includes:
    - a) operators of critical infrastructure (such as telecoms, energy, certain IT systems);
    - b) software developers involved in operating such critical infrastructure;
    - c) manufacturers or operators of governmental telecommunications surveillance systems;
    - d) providers of cloud-computing services; or
    - e) providers of telemetrics infrastructure for the health industry
- Where the domestic target falls within a "catalogue industry" the parties will be obliged to ***notify the signing of the SPA*** to the Ministry
- The in-depth review period lasts ***four months*** from notification and may be suspended for the period during which the parties negotiate remedies with the Ministry
- The hard cut-off for the Ministry for initiating a review ***is five years after signing of the SPA***

National security investment review
The German Regime (continued)

Recent Developments

- The cross-sector approach was amended in July 2017 to include "catalogue industries" and to extend the review period to four months
- Since the revised mechanism was introduced in July 2017, ***more than 80 cases have been investigated***, one third of which are said to have involved investors from China
- On 1 August 2018, the Ministry ***was set to block a foreign investment*** under the revised cross-sector approach, until the Chinese investor withdrew. The target, Leifeld, was a company specialising in metal forming in the automotive, chemicals, aerospace and the nuclear industries
- The German government is ***considering lowering the threshold for FDI screening to 15%*** and adding further thresholds to permit fresh review if shareholdings are subsequently increased

National security investment review
The French Regime

- The current French FDI regime (under the so-called "Montebourg Decree") applies to ***material investments*** (e.g .controlling interests in a company), by a ***foreign investor in a French company*** operating or involved ***in a regulated sector*** (e.g. fuel supply, natural gas, electricity, telecoms networks and public transport).
- The ***class of relevant regulated sectors is broader for non-EU/EEA investors***, and *inter alia* include, in addition, R&D and manufacturing related to biological and toxic agents, communications interception equipment; IT security services for certain public and private sector entities, and dual-use products
- Applications for clearance of relevant transactions must be filed with the French Minister for Economy prior to closing. ***Clearance is a condition to closing***
- The Minister for Economy has ***two months*** from receipt of a complete notification in which to review the application

National security investment review
The French Regime (continued)

Proposed Amendments

- Draft legislation was introduced in June 2018 to amend the French FDI screening regime in order to further protect certain key industries, especially high-tech sectors (the "Loi PACTE"). The ***Loi PACTE is currently under review*** by the French legislature
- In addition to sectors already subject to the French FDI regime, the Loi PACTE will cover ***sectors including the semiconductor production, space-related products and research, drones and, if relevant to French national security, AI, cyber security, data storage and robotics***
- The Loi PACTE will grant the French Government additional powers, including the ability to:
  - suspend voting rights
  - limit or prohibit dividend payments
  - prohibit share or asset transactions
  - impose a public commissioner on the target, with powers to intervene in the company's decision-making
- Failure to comply with the French FDI rules or with obligations imposed by the French Government may result in fines of up to two times the value of the investment, or 10% of the investors annual turnover

CURRENT ANTITRUST LAW TRENDS AND ISSUES FOR TECHNOLOGY COMPANIES

QUESTIONS

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- In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.
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David Brenneman represents clients primarily in mergers, acquisitions, joint ventures, and civil antitrust litigation. In the merger process, David works on premerger notification under the Hart-Scott-Rodino Act, international merger control, merger investigations, second requests, and compliance with consent orders. David represents pharmaceutical, chemical, and financial services clients before the Federal Trade Commission and US Department of Justice, and he coordinates filings for multimillion- and multibillion-dollar transactions worldwide. David is a member of the Morgan Lewis Committee on Foreign Investment in the United States (CFIUS) working group.

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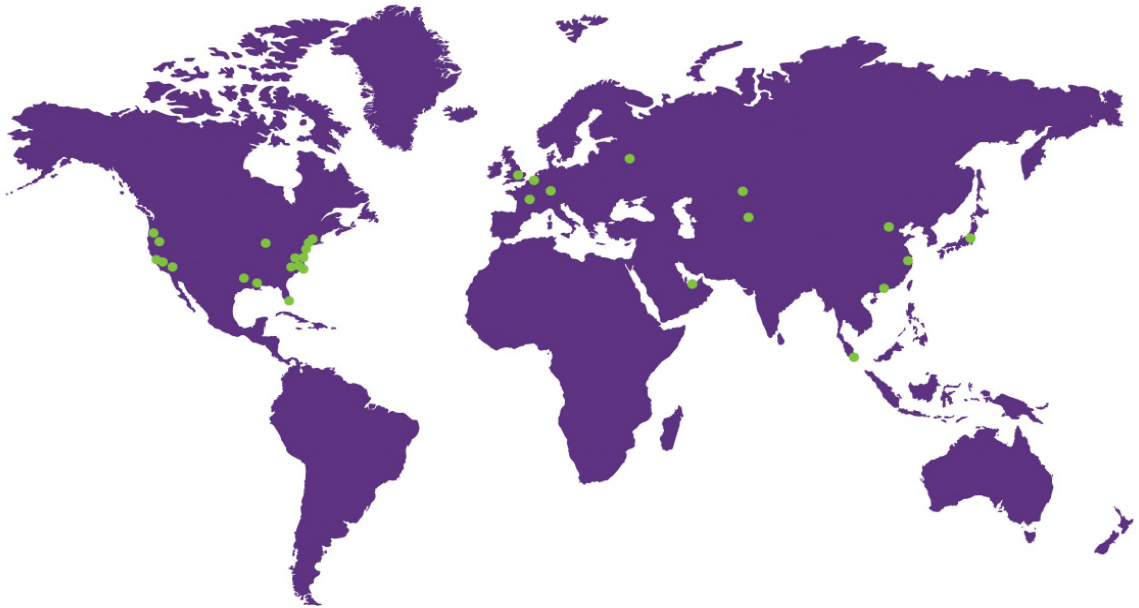

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