Milbank

FEBRUARY 26, 2015

CONTACTS

Dr. Alexander Rinne
Partner
+49 89 25559 3686
arinne@milbank.com

Fiona A. Schaeffer
Partner
+1-212-530-5651
fschaeffer@milbank.com

Satyen Dhana
Associate
+44-20-7615-3018
sdhana@milbank.com

Antitrust Group Client Alert: What to Expect in Antitrust Enforcement in 2015

In an environment of escalating antitrust activity around the globe with ever increasing government sanctions and private litigation exposure, it pays to ensure that your antitrust compliance efforts evolve with changes in your business and the enforcement landscape and are road-tested through regular audits. In this briefing, we highlight some key areas of antitrust enforcement to be prepared for in 2015.

AGGRESSIVE PROSECUTION OF CARTELS WILL CONTINUE

With the proliferation of leniency programs and "amnesty plus" incentivizing companies to self-report cartel conduct, 2015 is likely to bring new cartel investigations and expansion of existing cases into related product markets. The international auto parts cartel illustrates how these investigations can spread rapidly throughout an industry (the auto parts investigation initially involved wire harnesses and now encompasses over 120 automotive components) and to an ever increasing number of antitrust regimes, which benefit from international cooperation agreements with the leading antitrust agencies. The number of investigations in auto parts alone make it likely that 2015 will exceed the level of fines imposed in 2014, which saw the U.S. Department of Justice ("DOJ") securing a new record high of $1.27 billion in fines for criminal antitrust activity (an 11% increase over FY2013) and the European Commission imposing fines totaling €1.67 billion (nearly $2.3 billion).

After achieving its first two extraditions for criminal antitrust offenses in 2014 (an Italian national from Germany and a Canadian national), the DOJ will be looking for more opportunities to extradite foreign nationals to the U.S. -- where average jail terms for cartel offenses are now 25 months -- to face prosecution for their participation in international cartels.

The DOJ has warned that it will take a "hard line" with repeat offenders and companies that "selectively disclose" cartel conduct. A recent example is Bridgestone, which pled guilty to participating in the auto parts cartel last year.

The DOJ stated that Bridgestone's failure to disclose its involvement in the auto parts cartel in 2011, when it pled guilty to price fixing and violations of the Foreign Corrupt Practices Act ("FCPA") in the marine hose cartel, contributed to a much higher fine in 2014 ($425 million) than the $28 million it paid in 2011. The clear message is that the DOJ expects companies reporting antitrust violations to conduct a thorough internal investigation not only of the products concerned, but also other products and markets where the company may have issues.

SPOTLIGHT ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

A recent study by the European Commission estimated that corruption may be increasing the cost of public procurement in Europe by 20% to 25%. Given the impact on government budgets, enforcers around the globe are increasingly scrutinizing public tenders for evidence of corruption. These investigations often reveal evidence of agreements between competing bidders to rig bids and fix prices, using payments to government officials to implement and reinforce these collusive agreements. The ongoing investigation of Brazil's state petroleum company, Petrobras, has now implicated more than a dozen multi-national construction companies for alleged bid rigging. The international marine hose cartel investigations involved simultaneous prosecution of antitrust and FCPA violations. Penalties in this arena also may include disbarment from future government procurement opportunities, which could be devastating to the companies concerned. Given the level of risk and business exposure, especially for "repeat offenders", we are seeing more self-reporting of questionable contacts between bidders in order to secure the benefits of leniency or cooperation credit.

EXCHANGING COMPETITIVE INFORMATION IS AN AREA OF HIGH RISK

Recent antitrust cases involving the Libor benchmark, foreign currency and various commodity pricing indices underscore that exchanging sensitive information with business competitors can pose significant antitrust risks particularly when companies ignore the "safety zones" established by antitrust enforcement authorities.

In the past, regulatory interest in "information exchanges" tended to focus on exchanges of competitive information that facilitated agreements between competitors on production or pricing decisions. Now, regulators are investigating and prosecuting companies for information exchanges even where the competitive harm to the market is not obvious. Intermediaries that facilitate competitor information exchanges also are at risk. Earlier this month, the European Commission fined the UK broker ICAP for "facilitating several cartels" by disseminating information to certain Libor panel banks and serving as a communications channel between traders at the banks.

We expect that regulators will continue to focus on information exchanges, particularly in financial services and other information-driven markets, in 2015. This year also will see decisions in a number of important cases that may require companies to adjust their compliance policies.

PRIVATE DAMAGES ACTIONS IN EUROPE LIKELY TO INCREASE

To date, Germany and the United Kingdom have been the preferred venues for claimants to bring antitrust damages litigation in Europe because courts in other EU member states lack the necessary procedural and substantive rules. In late 2014, the EU enacted the Directive on Antitrust Damages Actions, which is designed to facilitate private antitrust damages actions throughout the EU. It requires Member States to implement national measures to allow claimants to bring cases and obtain full compensation (actual damages, lost profits and interest) in national courts. The Directive provides minimum standards for access to evidence and unified rules on limitation periods to give claimants sufficient time to assess their claims after a government investigation has been concluded. Importantly, it also requires Member States to introduce in their national legislation a rebuttable presumption that cartels cause economic harm. Claimants may include indirect purchasers, although defendants may be permitted to assert the passing on-defense.

All Member States must implement the Directive by the end of 2016. Although Germany and the United Kingdom likely will remain the most attractive venues for claimants, other Member States such as the Netherlands are keen to attract more private damages claims. In sum, these developments mean that private damages actions following (or in parallel to) government investigations increasingly will be the norm in Europe, much like in the U.S. today.

INCREASING NATIONAL SECURITY AND PUBLIC INTEREST CONCERNS IN CROSS-BORDER M&A

For many years, cross-border M&A has required careful management to navigate antitrust review in merger control regimes around the world. Now, in addition, merging parties need to be aware of the increase in foreign investment regimes and the risk of delay and intervention on national security and public interest grounds.

In the U.S., the number of foreign investment deals reviewed by the Committee on Foreign Investment ("CFIUS") continues to grow, and the reported investigations suggest that CFIUS is looking at broader economic and public interest issues, as well as traditional national security concerns. Recent transactions that CFIUS has reviewed include the defense industry, critical infrastructure, advanced technologies, energy, telecoms and transport, the financial sector and even food supply.

Although notification to CFIUS is voluntary, CFIUS is able to investigate transactions on its own accord and to impose conditions, including divestiture, before or even after closing. Therefore, foreign investors seeking to acquire U.S. businesses or assets in potentially sensitive industries should seriously consider the benefits of voluntarily notifying their merger and obtaining clearance from CFIUS prior to completing their deal. Merging parties also should consider addressing foreign investment review risks in their merger agreements. Regulatory efforts provisions should be broadly drafted to cover remedial actions necessary to resolve national security/public interest concerns and the payment of a reverse break-up fee also should be triggered by the deal failing on these grounds.

In Europe, the French government recently enacted a new law on foreign investments, reportedly in response to General Electric's announcement of its bid to acquire Alstom. The new law has significantly extended the "strategic" sectors requiring notification and pre-closing approval by the Minister of Economy to include energy, transport, water, public health and telecommunications, as well as national defense and information technology. It remains to be seen whether other member states will follow France's lead.

INCREASING REGULATION OF COOPERATIVE AGREEMENTS AND MINORITY INTERESTS

In Brazil, certain acquisitions of minority interests have been subject to premerger notification since its new competition law was enacted in 2012. Under the new law, acquisitions of as little as a 5% shareholding may be notifiable if the purchaser and the target are competitors.

The new law also requires certain "associative agreements" to be notified to CADE prior to taking effect. In November 2014, CADE issued new rules clarifying that an associative agreement with a term of at least two years is subject to the pre-merger reporting requirements in Brazil (assuming the turnover thresholds are met) where

(a) the parties are competitors and their combined market share is at least 20%; or (b) the agreement involves (i) a customer or supplier (or other vertical relationship); (ii) one party has a share of at least 30% in an affected market; and (iii) the agreement includes profit/loss sharing or exclusivity provisions.

Companies with businesses in Brazil should ensure their transaction compliance protocols are updated to reflect that Brazil may require pre-notification of exclusive distribution agreements and other routine business contracts that do not require notification in other pre-merger control regimes, such as the EU and the U.S.

In Europe, the European Commission is considering extending the EU Merger Regulation to the acquisition of non-controlling minority shareholdings. In its recent White Paper, the European Commission proposed a "targeted transparency system"

where an "information notice" -- which would trigger a 15 day waiting period -- would be required for an acquisition of a non-controlling minority shareholding with an EU dimension that creates a "competitively significant link" between the purchaser and the target. The European Commission has described a "competitively significant link" as: (i) the acquisition of a minority shareholding in a competitor or vertically related company and (ii) the shareholding to be acquired is (a) 20% or (b) between 5% and 20% accompanied by additional factors such as a de facto blocking minority at shareholders' meetings, a board seat or access to commercially sensitive information of the target. If, after receiving the information notice, the European Commission decided to investigate further, the parties would have to notify the transaction under the usual procedure. The new Competition Commissioner Margrethe Vestager has suggested the European Commission should draw on the experience of national competition authorities in order to balance the burdens of the "targeted transparency system" on companies with the possible competition concerns raised by acquisitions of minority shareholdings and the need for legal certainty.

EXPANSION OF EU DATA REGULATION

The internet has dramatically changed the way that companies do business and in the next few years, even more transactions will be made online. As a result, e-commerce and online content is a key area of focus for antitrust regulators, including the treatment of emerging platforms that capture strong market positions through network effects. Central to the online world is data. Google is being investigated by the EU and other regulators across the globe, but data control is an issue that affects virtually every business. In 2015, we expect to see regulators turn their attention to the use of data by other companies that control large volumes of consumer data.

The EU also is expected to adopt the General Data Protection Regulation this year. The Regulation will require all non-EU companies that process data of EU residents to comply with the EU data protection laws. It will also harmonize data protection regulations throughout the EU. This regime now comes with serious penalties: companies that violate the EU data protection laws could face fines of up to 5% of worldwide turnover.

EFFORTS TO PROMOTE COMPETITION IN ONLINE DISTRIBUTION AND PLATFORMS

In Europe, national competition authorities such as the German Federal Cartel Office are expected to continue challenging restrictions on internet sales. To avoid fines, some brand manufacturers including Adidas, Bosch Siemens Hausgeräte, Sennheiser and Gardena have changed their distribution systems to allow dealers to use online platforms such as Amazon and eBay, or grant comparable rebates for online and offline sales.

The European Parliament continues to advocate for the European Commission to unbundle Google. In Germany, under pressure from the regulator, Amazon abandoned its MFN policy, which precluded third-party resellers from offering goods at lower prices on platforms competitive to Amazon (the so-called best-price clause). The online travel portals HSR and Expedia face similar challenges in Germany, Austria, France, Italy, Sweden and the UK.

ANTITRUST GROUP

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Antitrust Group.

If you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose "Client Alerts" under "News."

YOUR ANTITRUST TEAM

Dr. Alexander Rinne	arinne@milbank.com	+49-89-25559-3686
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Nicholas Spearing	nspearing@milbank.com	+44-20-7615-3116
Dr. Andreas Boos	aboos@milbank.com	+49-89-25559-3686
Satyen Dhana	sdhana@milbank.com	+44-20-7615-3018
Dr. Katharina Kolb	kkolb@milbank.com	+49-89-25559-3687
Dr. Moritz Lichtenegger	mlichtenegger@milbank.com	+49-89-25559-3686
Dr. Tatjana Mühlbach	tmuehlbach@milbank.com	+49-89-25559-3687