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CONTACT

Nicholas Spearing
Partner
+44 20 7615 3116
nspearing@milbank.com

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

Anti-Trust Briefing Client Alert: Where are my servers located? A new world for in-house counsel

Life was so much simpler when dawn-raid checklists were quaintly obsessed with filing cabinets, locked drawers and desk diaries. Not any more.

Most evidence in European and UK anti-trust investigations is now contained in electronic documents, emails and even voice recordings. So, all in-house lawyers with any responsibility for regulatory investigations need a real feel for their company's IT infrastructure.

Electronic document review is a critical part of the OFT and European Commission's armory. The significance is not limited to cartel cases. We have seen an increase in the use of electronic data requests by regulators in wider contexts, including merger reviews and UK market investigations.

The emphasis of this area has been highlighted recently by the ***updating of European Commission procedures for seizing IT data in dawn raids***. Importantly, the guidance makes it clear that companies must co-operate fully with inspectors (and provide the necessary staff) to explain how their IT systems work as well as where relevant IT data is stored.

In addition, the deadlines for production of information are often very tight – a matter of weeks may sound like a considerable amount of time, but it is not. Time needs to be built in to review any documents before they are sent to a regulator: the case impact needs to be assessed. This can be very challenging if there are a large volume of documents to review and, as often occurs, there is a delay in locating the documents in the first place. Regulators are reluctant to give deadline extensions. They often treat IT data provision as comparable to pulling documents “off the shelf”. Unfortunately, it is not. Companies must position themselves so as to avoid being forced to meet a deadline by providing documents, which they have not had a chance to review: a risky outcome.

Some key questions to think about:

- **Where are your electronic documents held?** What combination of C-Drives, flash drives, personal computers and other electronic devices and servers?
- **Where are your servers?** Often not where you think they would be. Particularly if your company has outsourced storage to a third party. Outsourced services can present their own challenges: pressure to comply with a regulatory deadline, coupled with reliance on a third party to produce disks or download server information. Your IT Director may have to leverage the provider relationship to achieve the desired result. Companies need to satisfy themselves that their outsourcing agreements ensure prompt compliance with any requests.
- **How do you send the information to the regulators?** It may be tempting simply to produce CDs or dispatch a flash drive containing the documents. However, consider offering a data room, giving the regulator access to the documents (often at your external counsel's offices), which provides a more "controlled" environment for supervising and monitoring the disclosure. The OFT and the European Commission may actually find this more convenient.

Know and brief your IT Team: in the pressured circumstances of a raid or document trawl, all team members need to be clear as to the corporate objective and the proper limits of cooperation.

AND FINALLY...

We briefly point to just some of the other areas that are under the spotlight in UK and European competition law:

- **Something old:** the Commission has published its proposed revisions to the Technology Transfer Block Exemption and guidance. One area in which the Commission has provided significant clarification is in its policy towards patent pools. Although these are not automatically block exempted, they can, in the Commission's eyes, be pro-competitive. The way in which technology pools are created, organised and operated can reduce the risk of anti-competitive effects. As a result, the Commission has, for the first time, provided companies with guidance on the best way to design them, thus creating a "safe harbour" for at least some pools.
- **Something new:** the Commission has announced its much anticipated fine against Microsoft for failure to adhere to its commitments on choice of browser for Windows. The fine (€561 million) is at a level that serves as a deterrent and a warning that the Commission is willing to impose major penalties to make sure companies keep to their promises. Given its experience with Microsoft, the Commission is also

likely to take a more aggressive approach to the monitoring of commitments going forward.

- **Something borrowed:** the OFT has announced that it intends to make a market reference to the Competition Commission in respect of the supply of payday lending in the UK. Having found a number of issues with compliance and poor practices, the OFT also found potential features (lack of transparency; price insensitive customers and high switching costs) that make it consider a market reference may be justified.
- **Some whistle blew:** the Commission has become increasingly vocal about its investigation into LIBOR, with recent Almunia statements about prioritising certain currencies (EURO, YEN and CHF). However, the Commission has also indicated that it wants to reach settlements/conclusions with all relevant parties in a co-ordinated way: which may mean that its investigations are not concluded particularly quickly given the difficulties of reaching a co-ordinated and agreed settlement position amongst a large number of banks.

ANTI-TRUST & COMPETITION

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LONDON

10 Gresham Street, London, EC2V 7JD

Nicholas Spearing	nspearing@milbank.com	+44 20 7615 3116
Satyen Dhana	sdhana@milbank.com	+44 20 7615 3018

MUNICH

Maximilianstrasse 15, (Maximilianhofe), 80539 Munich

Alexander Rinne	arinne@milbank.com	+49 89 25559 3686
Andreas Boos	aboos@milbank.com	+49 89 25559 3637
Christoph Kahle	ckahle@milbank.com	+49 89 25559 3600
Katharina Kolb	kkolb@milbank.com	+49 89 25559 3646
Tatjana Mühlbach	tmuehlbach@milbank.com	+49 89 25559 3686