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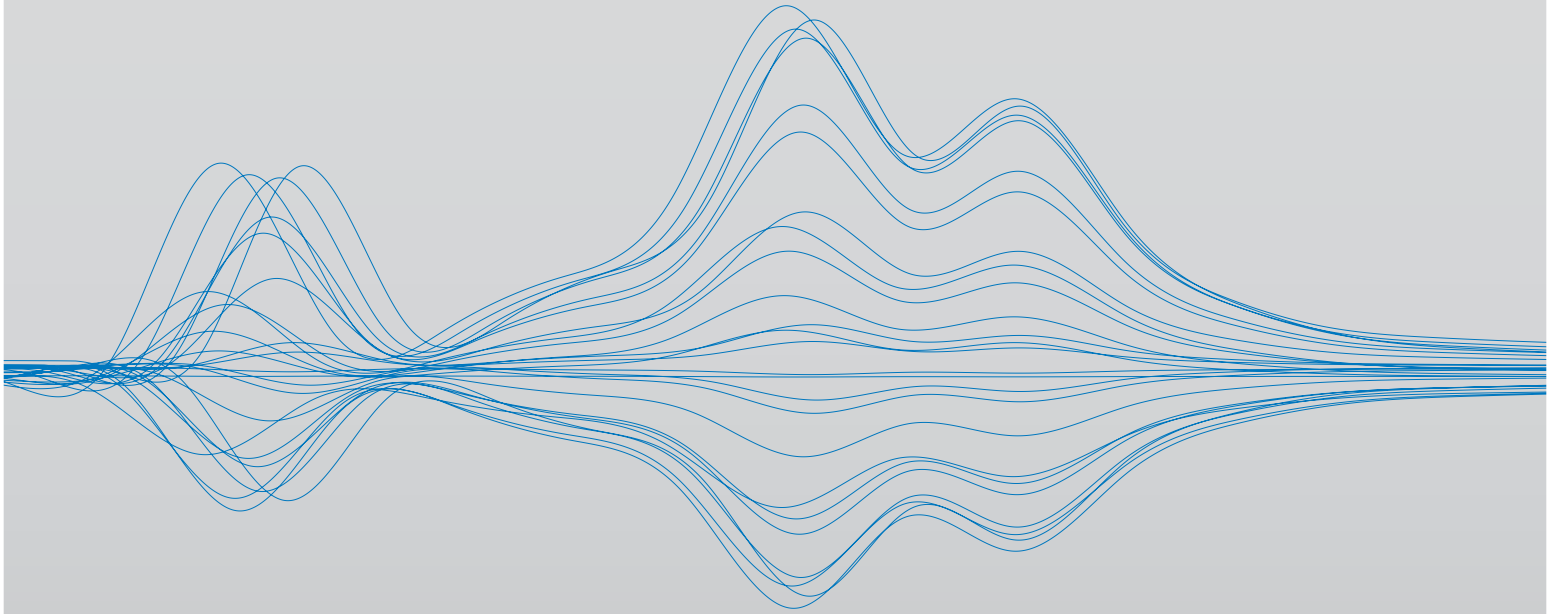
Antitrust Matters



DLA PIPER

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Editorial

By Léon Korsten

We are living in turbulent times, and, while many forces contribute to the turbulence, the main long-term trend continues to be climate change. Consequently, the focus on competition and sustainability, which we discussed in the previous issue of *Antitrust Matters*, will not fade away, but continue to grow. Whether the European Commission will generously accommodate European businesses in their desire to join forces in defeating this danger remains to be seen. The recently published draft guidelines on horizontal cooperation seem to offer an opening, but only a small one.

Parental liability has been a steady concern in European competition law for decades. It has become one of the central tenets in public and private enforcement of European competition law. The recent decision of the Court of Justice of the European Union in the *Sumal* case, is not the last word, but one more step in the same direction. In this new issue of *Antitrust Matters*, you will find a brief overview of the state of affairs, with a reminder that the importance of compliance for groups of companies and joint ventures can hardly be underestimated.

Unlike in the US, enforcement focused on "no poach" agreements – promises between or amongst employers not to hire or recruit each other's employees – is fairly new to Europe and Asia. In their contribution in this issue, Nathan Bush, Yong Min Oh, David Smail and Léon Korsten discuss this developing trend and cover employment law trends relating to the Gig Economy, Employee Misclassification and Industrial relations.

Foreign direct investment (FDI) screening, while anything but new, has the wind at its back. Whereas a few years ago only a handful of countries had mature FDI screening, it is increasingly the norm for a country to have rules in place to protect essential infrastructure and industries from hostile foreign takeovers. The United Kingdom is – after Brexit not entirely surprisingly – the pre-eminent example of a country that has recently implemented a very comprehensive, very strict regime for FDI screening retroactively. You can read more about this in Alistair White's contribution on the UK National Security and Investment Regime.

We wish you wisdom in defining and adjusting the course you wish to follow.

The ever-expanding nature of parental liability in competition law, and its practical implications

By Daniel Colgan, Miguel Mendes Pereira and Robbert Jaspers

Introduction

In recent decades, the European Court of Justice (ECJ) and the European Commission have been on a straight path to completely blur the distinction between various legal entities in a group of companies when it comes to liability for breaches of competition law. Essentially, legal entities within a group of companies can be held liable for each other's infringements of competition law if they are connected through a relationship of so-called decisive influence. This creates de facto group liability – a stark contrast to the concept of limited liability in civil law.

The legal justification for this is that EU competition law applies to undertakings and not to companies. Undertakings are seen as single economic entities. This concept, thus, focuses on the economic and not the legal reality.

Recently, the concept of parental liability, where a parent company is held liable together with its subsidiary, has found its way into the evolving area of private enforcement of competition law. It is also extending its reach to civil liability in damages actions before national courts.

Below we will set out which steps the ECJ has taken to continuously expand the scope of parental liability, and we will provide an overview of some important practical implications.

The ever-expanding scope of parental liability

The first judgments establishing that parent companies could be held liable for infringements of competition law of their subsidiaries were written decades ago. All these judgments seemed to provide that there needed to be some form of involvement by the parent company for it to be held liable.

In the *Akzo* judgment, the ECJ clarified that this is not necessary, thus creating a helpful tool for the European Commission (and some national authorities) to hold parent companies liable for infringements committed by their subsidiaries. The *Akzo* judgment is known for the (rebuttable) presumption that if a parent company holds, directly or indirectly, all or virtually all of the capital in a subsidiary that has committed a competition law infringement, it can be held liable. The ECJ implies that this presumption can be rebutted, but it remains to be seen whether this is really the case, as up until now not one company has been able to rebut the presumption; indeed, this seems to require *probatio diabolica*. Moreover, the presumption has been applied to parent companies that do not hold all capital in their subsidiaries or merely hold all voting rights.

In addition, the ECJ has held in *E.I. DuPont and Dow* that in joint ventures where each parent company holds 50 percent of the shares, the parents can be held jointly and severally liable for infringements committed by the joint venture company. From the *Toshiba* judgement, it follows that even in the case of shareholdings under 50 percent, parent companies can be held jointly and severally liable. In *Versalis* the ECJ even went as far as deciding that it is legitimate to hold liable a sibling company of an infringer of competition rules if the business unit that has committed the infringement has been transferred from one subsidiary to another subsidiary of the same parent.

The most recent clarifications of the reach of the concept of parental liability concern judgments of the ECJ in preliminary reference cases on parental liability in civil damages cases such as *Skanska* and *Sumal* and seem to suggest that subject to certain conditions the single economic entity doctrine may also be applied to liability for damages in private follow-on damages cases, where customers of infringers of competition law try to obtain compensation from the companies that have been fined. In *Sumal,* the ECJ even held that under certain circumstances subsidiaries could be held liable for infringements of parent companies.

Practical implications

FINES

Application of the (single) economic entity doctrine has important implications for the public enforcement of EU competition law. According to settled case law, when an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. Personal liability entails that, in principle, an infringement of competition law is to be attributed to the natural or legal person who operates the undertaking which participates in the infringement (in other words the principal of the undertaking is liable). Under the (single) economic entity doctrine, the anti-competitive behaviour of a subsidiary is also attributed to the parent, in particular where, although having a separate legal personality, that subsidiary does not decide autonomously upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent. Whenever possible, the European Commission and certain national competition authorities in the EU will, therefore, hold a parent jointly and severally liable with its infringing subsidiary.

The most obvious practical implication of parental liability for competition law infringements, therefore, is that in groups of companies, parent companies can be held jointly and severally liable for the infringements of their subsidiaries. Moreover, the 10 percent annual turnover cap that applies to fines for infringements of competition law applies to the whole group of companies belonging to the parent company, therefore, considerably expanding the potential limit on the amount of fines.

DAMAGES

In addition to this far-reaching effect of parental liability regarding fines, recent case law seems to indicate that the single economic entity doctrine can also apply to civil damages actions. However, this case law indicates that the concept is more limited in private damages actions and still poses various questions with regard to the exact scope of the concept in this domain.

Nevertheless, groups of companies should be aware of these implications, which may even lead claimants in damages cases to pick a company within the group of a competition law perpetrator that is located in a so-called claimant-friendly jurisdiction (this is sometimes called forum shopping) – with the attendant potential to increase exposure to civil damages actions.

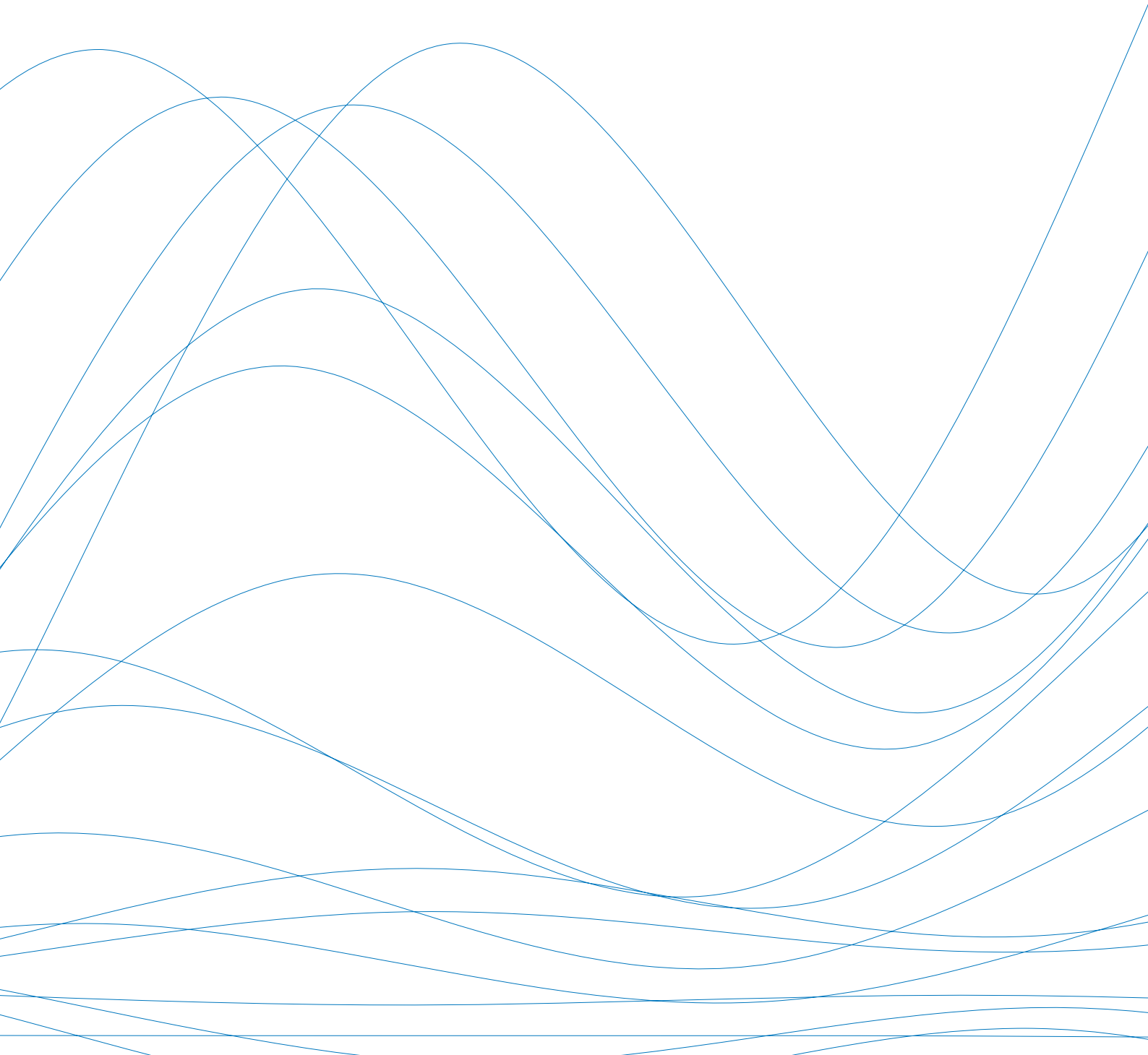
DUE DILIGENCE AND COMPLIANCE

Cartels are naturally hidden from sight. That also makes them difficult to spot in traditional due diligence exercises. Considering the considerable risks that parental liability poses, it is, therefore, wise to carry out a specific antitrust due diligence (including e-discovery) when integrating a new company into an existing group of companies.

Moreover, risks can be managed to a certain extent by taking them into account when negotiating warranties and indemnities. Once on board, it is important to integrate the company into the group-wide compliance program, which should encompass all group companies.

Conclusion

Competition law infringements lead to considerable parental/group liability risks. Therefore, groups of companies should have group-wide compliance systems in place and should be aware of the potential risks when acquiring new companies. Moreover, the legal developments regarding risks from damages actions will need to be monitored.



No-poach agreements in Asia and Europe

By Nathan Bush, Léon Korsten, Yong Min Oh, David Smail and Alexandr Biagioni

No-poach agreements are promises between or among employers not to hire or recruit each other's employees. Such agreements not to compete for those employees' labor have the potential to restrict competition in the labor market, resulting in less competitive remuneration or employment terms.

For the past decade, the antitrust enforcement agencies in the US have been leading vigorous enforcement efforts against no-poach agreements among competing employers. In 2016, the US Department of Justice and the Federal Trade Commission issued a joint Antitrust Guidance for Human Resources Professional which warned that no-poach agreements could subject employers to civil and criminal actions.

In Asia, competition laws across the region contain rules against cartels and other horizontal restraints that could readily be construed to prohibit no-poach agreements, but, to date, no enforcement actions have been brought by any of the competition authorities. Thus far, only the Hong Kong Competition Commission (HKCC) and the Japan Fair Trade Commission (JFTC) have provided prospective guidance on the issue.

In the European Union, in a speech at the annual conference of the Italian Antitrust Association in October 2021, EU Commissioner Margrethe Vestager stressed the need to place more emphasis on the enforcement of competition rules against buyer cartels which, in the Commissioner's view, are responsible for "making our economy work less efficiently." Commissioner Vestager noted that no-poach agreements are one of those examples in which the anticompetitive effects of the agreement do not necessarily manifest as increased prices for end consumers, but rather as restrictions on innovation and workers' mobility within the market. So far, however, all cases and investigations on no-poach agreements in the European Union have stemmed from national competition authorities (NCAs) at the member state level and have been based on assessments of both national and EU competition laws.

Hong Kong

Hong Kong's Competition Ordinance contains three categories of prohibitions, namely (1) anti-competitive and concerted practices; (2) abuse of a substantial degree of market power; and (3) mergers and acquisitions that substantially lessen competition in Hong Kong's telecommunications sector. The First Conduct Rule prohibits anti-competitive agreements and concerted practices by businesses, including horizontal agreements between competitors (such as cartels) and vertical agreements (such as resale price maintenance in a distribution agreement).

In April 2018, the HKCC issued an advisory bulletin on employment-related practices that give rise to competition concerns under the Competition Ordinance. The Bulletin cited no-poach agreement as an example of conduct at risk of contravening the First Conduct Rule. Along with no-poach agreement, HKCC's examples of potentially prohibited conduct included wage-fixing agreements between employers and exchange of competitively sensitive information between employers regarding employee compensation, be it reciprocal, unilateral or through a third party. Contravention of the First Conduct Rule can result in financial penalties (up to 10% of the company's turnover for a maximum of three years), director disqualification orders or other sanctions.

Japan

Japan's Antimonopoly Act (AMA), administered by the JFTC, prohibits unreasonable restraints on trade (cartels), private monopolization (abuse of dominance), unfair trade practices, and mergers and acquisitions. The AMA's prohibition on unreasonable restraints of trade applies to horizontal coordination amongst competitors at the same level of trade which eliminate or substantially restrain competition.

In February 2018, the JFTC published a report providing guidance on the application of the AMA in the human resources market and identifying competition issues that can arise in the context of hiring practices for employers. In the report, the JFTC clarified that agreements among employers regarding employment terms such as wage-fixing agreements are likely to violate the AMA because such agreements are intended to restrict competition and have a severely negative impact on competition. Such agreements among employers may not violate the AMA if they have pro-competitive effects or if they are found to be reasonable means for achieving a social or public purpose.

The report further elaborated on the application of the AMA with respect to no-poach agreements recognizing that such agreements may have pro-competitive effects because they incentivize employers to invest in training by allowing recoupment of training costs. The analysis does not end there,

as it would be necessary to determine whether no-poach agreements are reasonable and proportionate to achieve the objective of recouping the costs of employee training.

Singapore

Competition law in Singapore is administered and enforced by the Competition and Consumer Commission of Singapore (CCCS), a statutory body established under the Competition Act (Cap. 50B) and which operates under the purview of Singapore's Ministry of Trade and Industry.

The Competition Act prohibits agreements, decision and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore; abuse of a dominant position in any market in Singapore; and mergers and acquisitions that substantially lessen competition with any market in Singapore.

To date, the CCCS has not carried out enforcement action relating directly to the labor markets, although in 2011, it took action in relation to a cartel case relating to the fixing of monthly salaries of Indonesian foreign domestic workers by employment agencies.

Europe

Despite Commissioner Vestager's remarks on no-poach agreements, it would be erroneous to suggest that member states' national competition authorities (NCAs) have not already investigated, or at least attempted to investigate, these types of horizontal agreements. As of this writing in fact, at least three different NCAs(in France, Italy and Portugal) have already issued fines and statements of objection against undertakings that made use of no-poach agreements.

In France, in September 2016, the French Competition Authority (AdlC) fined a total of 37 modelling agencies, representing almost the entire relevant market's presence in the country, a total of EUR2.3 million. for having coordinated pricing, to such an extent as to leave no room for negotiation, with the additional result of impairing the models' mobility within the French market.

Shortly after the above-mentioned decision by the AdlC, in October 2016 the Italian Competition Authority (AGCM) issued a EUR4.5 million fine against nine of the main modelling agencies, representing approximately 80% of the model management market in Italy, for having violated article 101 TFEU. The case stemmed from a leniency application that was filed before the AGCM by one of the modelling agencies in 2015 which proved the existence from 2007 to 2015 of a no-poach agreement, in the form of wage-fixing and no-hire agreements among the agencies. The underlying agreement was deemed to restrict competition by object and, as in the French case, the AGCM also fined the professional union for its role in the parties' anticompetitive conduct.

In May 2020, the Portuguese Competition Authority (AdC) issued a statement of objection against the Portuguese Professional Football League (LPFP) for having violated Portuguese competition law over the existence of a no-poach agreement within the LPFP. The AdC found that the football league maintained a no-poach agreement whereby football clubs committed to not recruit or hire players who had made use of the situation created by the COVID-19 pandemic to unilaterally terminate their employment contracts with first and second league's clubs.

Employment law concerns

While the focus to date has been on antitrust, there are also a number of employment law issues and trends which are relevant and could feature more heavily going forwards.

The gig economy and employee misclassification

In most APAC countries, there is an important distinction between employees and independent contractors (also known as consultants or freelancers). "Employees" generally work under the direction and control of an employer pursuant to a contract of service, whereas "independent contractors" are self-employed and have freedom over when, where and how they provide their services.

The conversation around no-poach agreements has to date centred around the non-poaching of "employees." However, as non-traditional business models such as digital platforms continue to grow and evolve with the expansion of the digital economy, antitrust authorities will increasingly encounter cases where the distinction between employees and self-employed independent contractors or service providers will need to be considered.

For example, in 2018 the ride-hailing platforms Grab and Uber were fined in connection with the sale of Uber's Southeast Asian business to Grab. Both platforms engage their drivers as independent contractors rather than hire them as employees. One of the issues considered by the Singapore Competition and Consumer Commission was the exclusivity obligations imposed by Grab that restricted a driver's ability to provide services on other ride-hailing platforms. The Commission viewed these obligations as a barrier to entry and/or expansion, and therefore they were removed from the drivers' contracts as part of the package of remedies under the infringement decision. Also, in 2019 in a contribution to the OECD (Organisation for Economic Co-operation and Development), Japan commented that trades between contracting parties and self-employed workers, unlike "traditional" workers covered by labor regulations, can in principle be regulated under the Antimonopoly Act.

This is an area where the lines are often blurred and few clear answers exist. In some countries, the risk of employee misclassification is high and there are well developed bodies of case law and/or legislation that apply (one example is Australia), whereas in others the risk is lower, provided the underlying contract makes clear that the individual is providing services as a contractor and not as an employee (as in Malaysia). It will be interesting to see how antitrust authorities grapple with the question of whether agreements not to poach gig economy and other alternative workers would also fall foul of antitrust laws.

The gig economy and industrial relations

Collective bargaining is a process in which a recognized trade union seeks to negotiate better employment terms and conditions for its employee members. In countries that have antitrust frameworks and which also recognize trade unions, it is unlikely that employees in a single firm associating for the purposes of collective bargaining will fall foul of antitrust laws because they are not considered "undertakings." However, independent contractors who associate may in principle breach antitrust laws because they would be considered undertakings who are competitors that supply services. Singapore raised this issue in its contribution to the OECD in 2019, albeit in the context of agreements to protect salary levels rather than no-poach agreements per se.

Similarly, to the extent there is an exemption to collectively bargain on behalf of "employees," this may not be broad enough to apply to self-employed persons or independent contractors. This is the case in Singapore, for example, where the definition of "employee" under the Industrial Relations Act only applies to a person who has entered into or works under a contract ***of*** service with an employer as opposed to a contract ***for*** service.

Given this, if a trade union representing a membership of gig economy workers banded together and agreed not to poach service providers from a competing business, this could potentially fall within antitrust laws and would not be protected by the exemption that is typically extended to collective bargaining.

The great resignation and the war for talent

The Great Resignation (also known as the Big Quit or Great Reshuffle) is a recent phenomenon whereby employees are said to be resigning from their jobs en masse to pursue more rewarding opportunities. The long-term fallout of COVID-19 has meant employees are increasingly working offsite and many companies have transitioned to some form of remote or hybrid work policy. Employees are also experiencing higher levels of job dissatisfaction with increased mental fatigue, burnout and a desire to be geographically closer to family and friends or in more pleasant surroundings. The pandemic, that is, has given employees an opportunity to reconsider their careers and long-term priorities and take up roles that offer them to work more flexibly – often in other parts of the world.

The phenomenon is impacting some countries more than others. For example, India has seen large-scale resignations across many sectors of the economy, particularly in the IT sector which saw over a million resignations in 2021. Hong Kong has also recently seen a mass exodus of employees (predominantly expats) in response to the government's quarantine and social distancing requirements, which are some of the strictest in the world. On the other hand, resignation rates in Singapore have remained consistently low throughout the pandemic, at 1.6% for the third quarter of 2021, which is below pre-COVID levels. The impact is also skewed towards Millennials and Gen Zs, who tend to prioritize flexibility over traditional concepts like compensation and title.

In countries where the Great Resignation is having the biggest impact, employers are now finding themselves in the middle of a war for talent. As a result, we are seeing an uptick in employment litigation, with employers increasingly looking to enforce the terms of non-competes and no-poach agreements in individual employment contracts. This is true even in sectors which have in the past been more relaxed about employees moving around in the labor market and to competitors, or for employers who may view individual covenants as unenforceable or not worth the time and expense of litigation. We expect this trend to continue and that employers may also turn to no-poach agreements as a further means of managing their attrition rates, without necessarily understanding the antitrust risks this would give rise to.

What's next

Antitrust agencies are increasingly looking at no-poach agreements around the globe. We expect this trend to continue in Asia. In addition to antitrust violations, employers in the region should be aware that no-poach agreements could raise general employment law concerns. In Europe, although no cases have been opened by the EU Commission at the time of this article, Commissioner Vestager's speech is a clear indicator that the EU Commission is likely to investigate the presence, and the effects, of such agreements within the EU as part of the DG COMP's investigative priorities. Undertakings and operators must exercise due care in ensuring that their HR and recruitment policies in this field are compliant with EU and member states' competition laws, given that they could otherwise face a fine of up to 10% of their overall annual turnover as well as actions for damages, brought by private parties, before the national courts.

Understanding the UK's National Security and Investment Regime

By Alistair White

The implementation of the UK's new investment screening regime in January 2022 marked a watershed moment for the UK government's ability to intervene in corporate transactions relating to the UK's national security. The National Security and Investment ("**NSI**") regime is a new regulatory hurdle that must be navigated, but should be viewed in the context of an international trend to strengthen investment screening controls.

Overview

In force from 4 January 2022, the National Security and Investment Act 2021 ("**NSI Act**") gave the UK government extensive new powers to investigate transactions that could harm the UK's national security. However, given its retroactive effect, the NSI regime actually applies to any qualifying transaction which completed on or after 12 November 2020, meaning these powers, held by the Department for Business, Energy and Industrial Strategy (BEIS) span a much longer period.

Broadly, these rules govern a significant amount of M&A activity impacting the UK, with some transactions subject to mandatory notification and others subject to a voluntary regime. Ultimately, the UK government is able to impose conditions on acquisitions which raise national security concerns, including in some circumstances unwinding or blocking an acquisition. There are also related civil and criminal penalties for non-compliance, so this isn't a regulatory development which can be ignored.

How does this regime change the regulatory landscape in the UK?

The UK government's previous powers to scrutinise transactions on national security grounds were contained in the Enterprise Act 2002 ("**Enterprise Act**") under the public interest regime, which continues in force to cover other public interest considerations. In particular, before January 2022, the Enterprise Act enabled the UK government to issue public interest intervention notices – known as PIINs – on certain strictly defined public interest considerations:

- media plurality;
- financial stability;
- national security; and
- (since June 2020) public health emergencies.

Ministers wishing to intervene under this regime, s/he must have a reasonable belief that a transaction raises one of these public interest concerns, as well as having reasonable grounds for suspecting that a transaction will result in a relevant merger situation.

However, very few transactions were subject to national security or wider public interest interventions under the Enterprise Act, with the UK government's impact assessment relating to the new regime giving a sense of the scale of the change in terms of the number of transactions that are affected. It estimates that the new regime will generate 1,000 to 1,830 transactions being notified per annum, with an estimated 70 to 95 detailed NSI assessments and around 10 remedies per year. This compares with just a handful of deals being formally reviewed by the UK government each year under the public interest regime.

It should be noted, however, that while the public interest regime no longer covers national security, the other public interest considerations outlined above remain, meaning the regime continues to operate, albeit with reduced scope.

Qualifying acquisitions

Under the NSI Act, the new rules will apply to qualifying acquisitions, which are termed "trigger events". A qualifying acquisition involves the satisfaction of three conditions.

First, there must be an acquisition of a right or interest in a "qualifying entity" or "qualifying asset". The assessment here is relatively straightforward: a qualifying entity is any entity other than an individual, whether a company, LLP, trust or other structure; while a qualifying asset is land, tangible moveable property, IP, or the like.

Second, the qualifying entity or qualifying asset is from, in or has a connection to the UK. As the reader will note, this condition is very broad and could include, as an example, the acquisition of a factory in France which produces vaccines for use in the UK.

Finally, the level of control acquired over the qualifying entity or qualifying asset must meet or pass a certain threshold. Here, again, the rules take a broad approach, but essentially this condition will be satisfied if the acquirer:

- takes a shareholding or voting interest in the target that crosses the 25%, 50% or 75% thresholds;
- acquires voting rights that allow it to pass or block resolutions; or
- acquires an interest which allows it to materially influence the policy of an entity or direct the use of an asset (though this level of control is not sufficient for the mandatory regime).

With respect to this final threshold, this concept is the same as that used in UK competition law, with the relevant consideration being whether the acquirer can materially influence the management of a target's business, including its strategic direction and its ability to define and achieve its commercial objectives. Guidance is available from the Competition and Markets Authority, the UK's competition regulator, on this topic.

Mandatory and voluntary

As noted, the NSI Act establishes a hybrid model in which there will be mandatory notification requirements in certain specified areas of the economy, with a voluntary regime for all other qualifying acquisitions. This approach, with both mandatory and voluntary processes, is consistent with (and has drawn on) the approach in the US, Germany and Australia.

Turning to the mandatory part of the regime first: parties will be legally required to notify the UK government about acquisitions of qualifying entities in seventeen sensitive areas of the economy, where they will be required to get clearance before completion. These areas are those where the UK government considers there are enhanced risks to national security, as follows:

- Advanced Materials;
- Advanced Robotics;
- Artificial Intelligence;
- Civil Nuclear;
- Communications;
- Computing Hardware;
- Critical Suppliers to Government;
- Cryptographic Authentication;
- Data Infrastructure;
- Defence;
- Energy;
- Military and Dual-Use;
- Quantum Technologies;
- Satellite and Space Technologies;
- Suppliers to the Emergency Services;
- Synthetic Biology; and
- Transport.

The exact scope of these areas is prescribed in a huge amount of detail in secondary legislation and official guidance. For now, however, it's important to emphasise that failing to notify a qualifying acquisition in a mandatory sector will result in the acquisition being void. Further, there are related civil and criminal penalties, e.g. a civil penalty could require an infringing party to pay up to 5% of its organisation's global turnover or £10 million, whichever is greater. A nuance which needs to be flagged here is that the mandatory part of the regime only applies to acquisitions of qualifying entities, not qualifying assets, as these fall only within the voluntary part of the regime.

Turning to this part of the regime, if a transaction is a qualifying acquisition in an area outside of a mandatory sector, or is an acquisition of assets within a mandatory sector, then it will be subject to the voluntary regime. This means that the parties have no obligation to inform the UK government of the transaction. However, if the UK government reasonably suspects that it might give rise to a national security risk, it may be "called-in" for review. In particular, the UK government will be able to assess acquisitions for up to five years after they have taken place and up to six months after becoming aware of them if they have not been notified.

It is anticipated that the voluntary part of the regime will be approached differently by different businesses, possibly due to either differing levels of internal risk appetite or enforced commercial requirements, e.g. where a seller refuses to accept a conditional transaction.

Assessment under the regime

As noted, the powers granted to the Secretary of State under the NSI Act seek to protect the UK's national security; however, the UK government intentionally does not set out the exhaustive circumstances in which national security is, or may be, considered at risk. This is longstanding policy to ensure that national security powers are sufficiently flexible to protect the nation.

That said, a UK government statement dated 2 November 2021 sets out that the Secretary of State is likely to use the call-in power where there may be a potential for immediate or future harm to UK national security, which it states "*includes risks to governmental and defence assets (infrastructure, technologies and capabilities), such as disruption or erosion of military advantage; the potential impact of a qualifying acquisition on the security of the UK's critical infrastructure; and the need to prevent actors with hostile intentions towards the UK building defence or technological capabilities which may present a national security threat to the UK*".

But what does this actually mean?

Helpfully, the statement goes on to identify the risk factors that will be considered by the Secretary of State in making his or her assessment:

- Target risk – this concerns whether the target is being used, or could be used, in a way that raises a risk to national security. Principally, the Secretary of State considers that entities which undertake activities in the seventeen mandatory sectors, or closely linked activities, are more likely to raise a target risk. However, the assessment of target risk should also involve consideration of any national security risks arising from the target's proximity to sensitive sites (examples of such sensitive sites include critical national infrastructure sites or UK government buildings);
- Acquirer risk – this concerns whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target. The Secretary of State will consider whether the acquirer poses a risk to national security. Characteristics of the acquirer such as the sector of activity, technological capabilities and links to entities which may seek to undermine or threaten the national security of the UK are likely to be considered in order to understand the level of risk the acquirer may pose. Some characteristics, such as a history of passive or long-term investments, may indicate low or no acquirer risk, and the Secretary of State does not regard state-owned entities, sovereign wealth funds or other entities affiliated with foreign states as being inherently more likely to pose a national security risk; and
- Control risk – this concerns the amount of control that has been, or will be, acquired (and a higher level of control may increase the level of national security risk).

There is, therefore, a framework in place which allows parties to assess the risk associated with the NSI regime, albeit that there is little information in the public domain that allows businesses and practitioners to assess the wider impact of the regime at this date.

The finer points

The NSI regime raises a number of issues, when its finer details are considered.

One key takeaway is that corporate restructurings or reorganisations can be caught, including by the mandatory regime. This goes further than many who are used to dealing with M&A activity, including competition practitioners, will anticipate, particularly given the single economic entity concept widely used in UK and international merger control regimes, and also many FDI regimes.

Another is that the UK government can assess a potential qualifying acquisition that has not yet happened if it reasonably suspects it may cause a national security risk. For example, if the parties to a transaction have signed heads of terms, the UK government is able to call-in that transaction if it anticipates national security concerns. This again is a material divergence from many other regulatory regimes, including most merger control regimes.

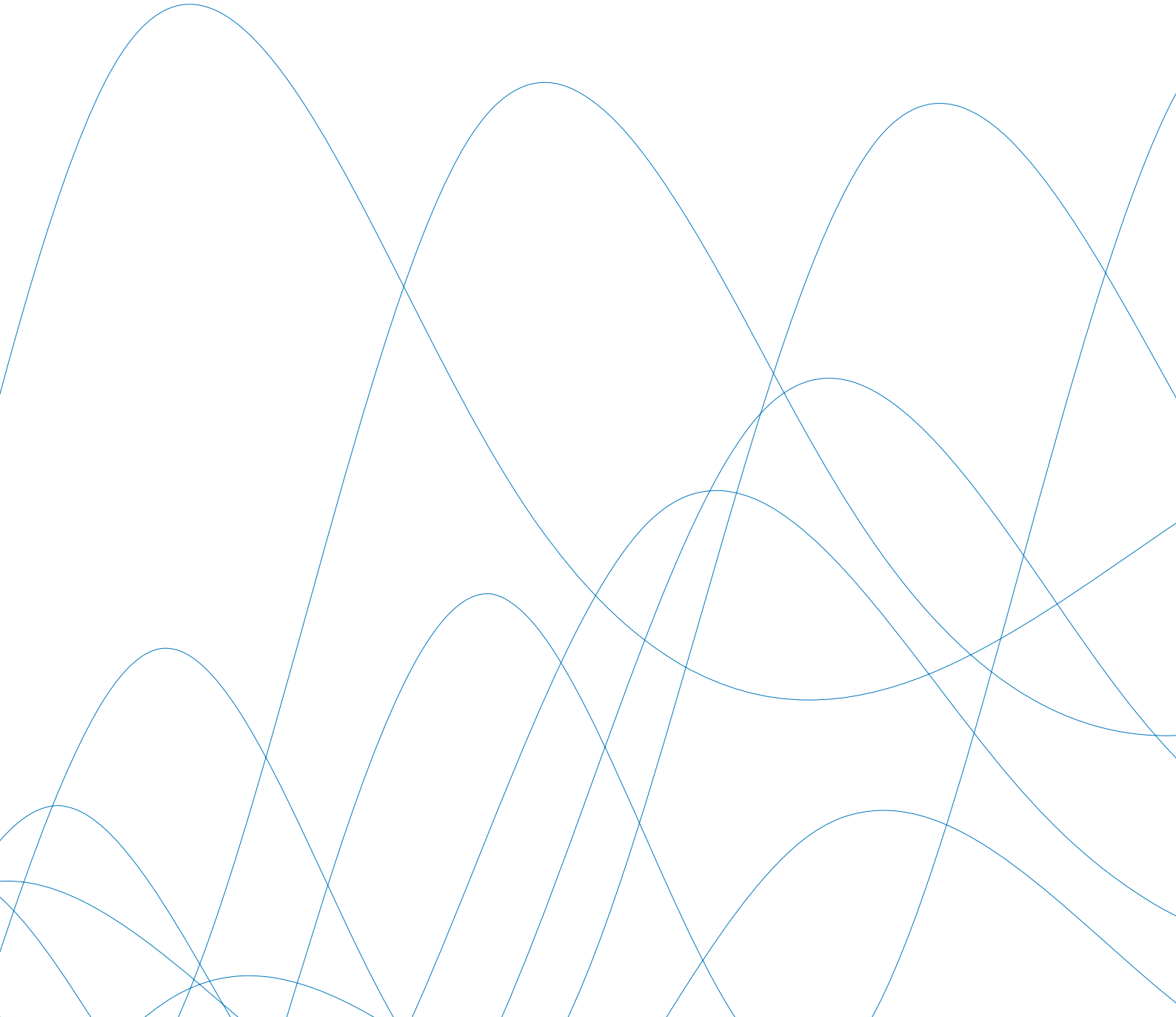
A further quirk which may not be anticipated by businesses is that the regime is nationality agnostic when it comes to jurisdiction, meaning acquisitions by UK acquirers will be caught in the same manner as acquisitions by foreign acquirers. Clearly, nationality will feed into the assessment of acquirer risk, but it will not negate the need to carry out a full assessment of the regime.

Finally, and this is a point identified above but which is worth reiterating due to its importance, the regime applies to UK-based entities and assets – which is expected for an FDI regime – but also to UK-connected entities and assets. This is less usual and so businesses must be on the ball when making acquisitions of potentially relevant qualifying entities or assets.

Conclusion

The NSI regime therefore presents a number of new challenges for businesses, adding to the increasing regulatory burden imposed on M&A participants in the UK, echoing a trend seen globally.

For further insight into the regime and its particular impact on those sectors most affected. please listen to the Understanding the UK National Security & Investment Regime Podcast series.



Top global pulp and paper company uses Aiscension to identify cartel risks

Aiscension, DLA Piper's award winning compliance monitoring tool, helps detect cartel activity within company data and communications.

The company implemented a huge internal cartel prevention programme after being fined USD15 million; and ordered to pay USD150 million compensation for antitrust violations.

The company General Counsel was concerned that the absence of active identification of cartel risks was a serious weakness in their compliance program. They use Aiscension to solve this problem.

The Aiscension audit of communications and documents identified issues in the content of some emails. If taken out of context, these emails could be misinterpreted to imply prohibited activities.

"Measuring Aiscension's benefits is easy. We were fined millions of Dollars (for previous anti-trust violations). We had to pay compensation of USD150 million, and the cost on our reputation. When you look at those costs, I think this solution is very cheap. If we could have applied Aiscension 10 years ago then we may have been able to identify the problem early."

— General Counsel, global pulp and paper company

Company objectives

01

Implement an effective compliance programme which prevents and actively identifies cartel risks.

Take active measures to identify:

- Evidence of rogue employees, aware of the rules but willing to break them;
- Accidental or unwitting non-compliance.

02

How did Aiscension meet those objectives?

Aiscension audited almost half a million communications and documents from company employees using neural-net AI. The AI had been trained on real evidence and behaviours from a wealth of previous cartel investigations and cases. This took less than 1% of the time a standard technology assisted review would have taken.*

The audit identified problematic emails which were then reviewed by DLA Piper lawyers. Aiscension's processing time was 95 hours rather than the ~3,180 to 7,952 hours a legal team would need.

Aiscension audited

01

477,142 documents and emails

13 employees

02

03

500 days of correspondence activity

*Based on DLA Piper's internal review figures.

"We will be proud to tell people that we did this process and we took it seriously, and we think it was worthwhile... We will definitely do another Aiscension audit next year."

— General Counsel, global pulp and paper company

"Failing in this area is an event which has a very low probability of occurring, but when you fail you massively fail."

— COO, global pulp and paper company

"Aiscension can help us sleep better at night."

— Commercial Manager, global pulp and paper company

Winner of The Lawyer Awards 2021

MOST INNOVATIVE USE OF TECH

Learn how Aiscension can add to your compliance monitoring.

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